

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3
4 BORIS GOLDENBERG, REINALDO
5 PACHECO, ANDREW LOEW and
6 GERALD COMEAU, as representative
7 of a class of similarly situated
8 Persons and on behalf of
9 THE INDUCTOTHERM COMPANIES MASTER
10 PROFITS SHARING PLAN #001,

11 Plaintiffs,

12 vs.

CIVIL ACTION
NO. 09-5202 (JBS)

13 INDEL, INC., individually and
14 A/k/a INDUCTOTHERM INDUSTRIES,
15 INC., and INDUCTOTHERM
16 CORPORATION, et al.,

17 Defendants.

18
19 UNITED STATES COURTHOUSE
20 ONE JOHN F. GERRY PLAZA
21 4TH AND COOPER STREETS
22 CAMDEN, NEW JERSEY 08101
23 (856) 968-4986
24 AUGUST 14, 2012

25 B E F O R E:

THE HONORABLE JEROME B. SIMANDLE,
CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

LISA MARCUS, C.S.R.
CERTIFICATE # 1492
OFFICIAL U.S. REPORTER

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1 DEPUTY CLERK: All rise.

2 THE COURT: Good afternoon. Be seated, please.

3 This is the case of Goldenberg, et al. vs. Indel, Inc.,
4 et al., Civil No. 09-5202, and today is the oral argument date
5 of various motions including motion for class certification,
6 the motion for partial summary judgment by the Inductotherm
7 defendants, and the *Daubert* motions filed by both sides.

8 So I'll ask counsel to please enter your appearances
9 for the record beginning with plaintiff.

10 MR. A. LAKIND: Thank you, your Honor. Good
11 afternoon. Arnold Lakind from the law firm of Szaferman,
12 Lakind for plaintiffs.

13 MR. R. LAKIND: Good afternoon, your Honor. Robert
14 Lakind from the law firm of Szaferman, Lakind on behalf of
15 plaintiffs.

16 MR. SAWICKI: Good afternoon, your Honor. Todd
17 Sawicki, Alston & Bird, for the FSC SunAmerica defendants.
18 And I'd like to introduce Mr. B.J. Webster who is one of the
19 principal investment advisors as part of the Wharton Group.

20 THE COURT: Okay.

21 MR. HINSON: Your Honor, Doug Hinson with Alston &
22 Bird, also on behalf of the FSC defendants.

23 MR. GENTILE: Your Honor, Vincent Gentile, Drinker,
24 Biddle & Reath, on behalf of the Inductotherm defendants,
25 including the individual trustees. I'd like to introduce two

1 of them, Mr. Krupnick, Lawrence Krupnick, and Mr. Manning
2 Smith.

3 THE COURT: Good afternoon.

4 MR. LEVIN: Your Honor, I'm David Levin with the firm
5 of Drinker, Biddle & Reath representing the Inductotherm
6 defendants.

7 MR. BARNDT: Matthew Barndt, your Honor, also on
8 behalf of Drinker, Biddle & Reath on behalf of the
9 Inductotherm defendants.

10 THE COURT: Okay. I thought that we would hear the
11 motions in the following order, unless you have a better
12 preference, and that is to have the motions for class
13 certification first and then the motion for partial summary
14 judgment by the Inductotherm defendants argued second, and
15 then, if time permits, argument on the *Daubert* motions filed
16 by each side.

17 Does that make sense?

18 MR. A. LAKIND: Does to the plaintiffs, your Honor.

19 THE COURT: Okay. Then, Mr. Lakind, you may proceed
20 with the class certification motion.

21 MR. A. LAKIND: Thank you, your Honor.

22 May it please the Court, I would like to address three
23 issues in connection with the class certification motion.

24 The first is the relevant substantive law that is
25 dispositive of the merits of this case insofar as that's legal

1 to the commonality typicality in the federal civil procedure
2 23(b) standards; secondly, the application of those standards;
3 and, third, the argument that there's a conflict among the
4 participants.

5 Let me first turn, if I might very briefly, to the
6 merits of the ERISA claims brought by plaintiff because the
7 merits of those claims and the elements of those claims bear
8 upon the disposition of a class certification motion.

9 In general terms we have filed a complaint under ERISA
10 404 essentially alleging that defendants are fiduciaries and
11 they failed to discharge their duty of prudence by use of an
12 Excessive Equity Allocation in Indel's selection of FSC. In
13 connection with the merits of this case, plaintiffs have the
14 burden of proof on that issue.

15 Secondly, we have alleged that defendants failed to
16 discharge their duties to administer the Plan in accordance
17 with the Plan documents by virtue of the absence of a trust
18 agreement in a decision to invest in Long-Short Funds. Once
19 again, plaintiffs have the burden of proof on those issues.

20 Secondly, we have the burden to propose to the Court
21 what *Donovan vs. Bierwirth*, a Second Circuit case endorsed in
22 the Third Circuit, has held, it's a plausible alternative
23 investment strategy. If on the merits we surmount those
24 burdens, the *Donovan* court teaches us that the Court is to
25 presume that the funds would have been invested in the most

1 profitable manner and, number two, the burden to prove that
2 these funds would have earned less under the proposal made by
3 plaintiffs, shifts to defendant in the nature of a mitigation
4 type claim.

5 Finally, *Donovan* teaches that any doubt is to be
6 resolved against the fiduciaries with regard to these issues.

7 So our burdens are to demonstrate liability, provide a
8 plausible alternative investment model, and defendant then has
9 the burden to show that no damages would have resulted if that
10 model were implemented.

11 The following principles overlay the law of class
12 certification, and they're derived from two recent decisions
13 from the Third Circuit Court of Appeals, the *Behrend* case and
14 the *Sullivan* case.

15 First, merits are to be considered to the extent
16 necessary in order to make a Rule 23 determination and no
17 more. Secondly, under *Hydrogen Peroxide*, the merits are to be
18 rigorously analyzed. However, in considering liability, it is
19 the Court's -- the Court's assessment is limited to a
20 determination as to whether defendants' conduct was common to
21 all members of the class, and the *Sullivan* decision teaches us
22 not on whether each plaintiff has a colorable claim.

23 Secondly, in considering damages, the Court's role is
24 to address only whether the plaintiffs have provided a method
25 to measure damages on a classwide basis, that is the holding

1 of *Behrend*, the Court need not determine whether that method
2 is just, is reasonable, or speculative.

3 Therefore, the first question before the Court is
4 whether or not defendants' conduct was common to all members
5 of the class. This in turn implicates two questions, what is
6 the conduct about which we complain and was it common to the
7 class?

8 First, one aspect of the alleged misconduct is the
9 failure to have a trust agreement, clearly that failure has
10 classwide implications.

11 A second allegation of wrongdoing stems from Indel's
12 failure to conduct an adequate investigation of FSC's
13 experience before retaining them, clearly that has classwide
14 implications.

15 Third, the use of Long-Short Funds, once again,
16 impacted the Plan in its entirety and that, too, had classwide
17 implications.

18 The fourth element was was the equity concentration of
19 the portfolio excessive given the Plan demographics,
20 particularly the age of the participants. That in turn
21 implicates two questions, was age considered and, if not,
22 should it have been?

23 First, the evidence --

24 And again, that, too, implicates a general question of
25 classwide implication. Insofar as the Court is inclined to

1 agree that all four of those claims implicate classwide
2 questions, we've surmounted the burden set forth by *Behrend*
3 with regard to commonalty.

4 And I'll move on to the other elements.

5 But defendants' briefs are largely addressed to issues
6 that are more appropriate to a motion for summary judgment, to
7 a motion directed to admissibility on the merits, to a motion
8 far beyond one for classwide certification. In excess of --
9 excuse me, class certification. In our brief we addressed the
10 different arguments advanced by defendants, and I'd like to
11 spend just a few minutes addressing them now before I turn to
12 the Rule 23 requirements.

13 First of all, we allege that age was not considered
14 when the asset allocation was developed. It's clear in the
15 course of depositions that Messrs. Webster and Hembrough
16 testified they didn't have any reliable information on age.
17 In response to our document request we were provided with no
18 documents that Indel claimed to have given to FSC with regard
19 to age. The one document that did refer to age reported that
20 75 percent of the Plan participants were within four years of
21 retirement, yet their average age was 46. So it was not --
22 whatever information was provided was not even consistent.
23 Even in their briefs, Inductotherm at Page 32 says 65 of 241
24 participants over 56 in 2009 and FSC at Page 12 only 12 of 241
25 in 2008. It's conceivable that a large number of people reach

1 56 at that age, but suffice -- excuse me, in 2009, but suffice
2 it to say even if defendants were to allege they considered
3 age, they simply didn't have accurate information.

4 Whether age is to be considered or not relates to the
5 viability of a claim and not a classwide issue. Suffice it to
6 say, however, B.J. Webster testified, the 30(b)(6) witness,
7 that asset allocation should be based on the individual
8 circumstances of the Plan, that entails age.

9 The Third Circuit in the *Bogosian* case said that a
10 fiduciary is called upon to employ proper measures to evaluate
11 structures of the Plan. The Third Circuit in the *Unisys* case
12 said a fiduciary's duty is to avoid large losses, without
13 consideration of age that cannot be accomplished. Defendants'
14 expert Lucy Allen acknowledged age can be important but other
15 factors, she testified in her deposition, are also important.
16 The SEC, FINRA, and SunAmerica all have commented on the
17 importance of age.

18 A decision outside this circuit in *GIW Industries* found
19 that a fiduciary was liable for failure to consider age in the
20 acquisition of assets. The Code of Federal Regulations, when
21 it discusses safe harbors for a variety of investment
22 vehicles, says consideration of age allows qualification for a
23 safe harbor.

24 Defendants in a reply brief cited an excerpt from the
25 Federal Register from October 2007, which talks about balanced

1 funds. But at Page 60462 of the Federal Register the
2 Department of Labor says that a fiduciary is to require -- is
3 required to consider age of the participant population, the
4 whole population.

5 Suffice it to say, that plaintiffs have alleged that
6 age should have been considered and was not. That is a common
7 question.

8 Second common question -- all these questions are
9 outcome determinative when measured by the *Dukes* standard, is
10 was FSC a fiduciary? The investment policy statement
11 indicates that FSC gave advice on allocation. What were the
12 different investment vehicles into which they were to invest
13 and what percentage? The FSC Vision 2020 Form describes FSC
14 as an investment advisor. I.R.S. Form 5500 describes them as
15 an investment manager.

16 Mr. Hembrough and Mr. Webster testified they viewed
17 themselves as fiduciaries. In the course of their depositions
18 both witnesses acknowledged they made recommendations as to
19 percentage of portfolio to be devoted to stocks, to bonds,
20 into a host of investment vehicles. They provided monthly
21 reports in which they undertook to set asset allocation and
22 rebalance the portfolio.

23 Again, it is not our burden to demonstrate that we will
24 prevail at trial; it is our burden to demonstrate a common
25 question under *Behrend* and *Sullivan*, and clearly FSC's status

1 as a fiduciary raises a common question.

2 The second burden which plaintiffs have in an ERISA
3 case and which informs the class certification analysis, is
4 our obligation to offer a plausible investment strategy. And
5 as the *Sullivan* and *Behrend* court said, that strategy need not
6 be a final strategy, it need not be a perfect strategy, it can
7 have flaws, but it has to demonstrate the ability to allocate
8 damages on a classwide basis.

9 The 44 percent equity, 56 percent fixed income strategy
10 proposed by Dr. Pomerantz is, frankly, quite close to the
11 50 percent strategy used by this Plan in 2002. It's quite
12 close to the 50/50 strategy referred to in their -- in
13 defendants' brief and employed in 2009. At Footnote 8 they
14 indicate they've adopted a new investment policy statement
15 that permits a 50/50 strategy. It's close to the 50/50 --
16 excuse me. The 44/56 strategy is close to the 50/50 strategy
17 FSC recommended to the Plan in March 2009, and it's a bit more
18 aggressive than what FINRA describes as a moderate portfolio.

19 Using this methodology, Dr. Pomerantz reviewed the
20 Plan's performance for each month, and in those situations
21 where the Plan performance exceeded his strategy, he awarded
22 FSC a credit and those in which it did not exceed that of his
23 strategy, he included that in his damage calculations. This
24 methodology can be applied on a classwide basis because
25 Dr. Pomerantz essentially testified at his deposition "If I

1 can do it for a Plan, it's very easy to do it for each
2 individual in the Plan." It is the same model that Indel uses
3 in the allocation of its performance and in the allocation of
4 losses in every monthly statement. In fact, there's evidence
5 before the Court that this very strategy was used when FSC
6 repaid the Plan for the money associated with the prohibited
7 transaction and instructed Indel you make the allocation. So,
8 clearly, that methodology can be applied on a classwide basis.

9 With this background in mind, if I might, let me turn
10 to the Rule 23 criteria. In the application of this criteria
11 the Third Circuit in *In Re: Schering Plough* advises ERISA
12 502 cases, which this is, are paradigmatic examples of cases
13 appropriate for the class certification. The Third Circuit in
14 *Eisenberg* says if the case is doubtful, it should be
15 certified.

16 Here, your Honor, are the common questions: The
17 existence of a Trust Agreement or its absence and the need for
18 a Trust Agreement; the adequacy of FSC's investigation; the
19 propriety of the Long-Short Fund investment, the propriety of
20 not considering age in the asset allocation. Each of these
21 questions is outcome determinative and meets the *Dukes* test.

22 Second element is typicality, which the Third Circuit
23 in *Eisenberg* held ERISA cases are derivative by their very
24 nature. Any recovery belongs to the Plan, it doesn't enrich
25 any specific individual. Since the recovery is allocated in

1 the single manner to the Plan, the plaintiffs' claims are of
2 necessity typical.

3 With regard to adequacy, your Honor, I outlined the
4 experience of Levy, Phillips & Konigsberg and my experience in
5 the brief. If your Honor wishes, I can run through it or I
6 can move beyond that.

7 THE COURT: No, I don't think that you need to repeat
8 what's in the brief.

9 MR. A. LAKIND: Okay. Thank you, your Honor.

10 With regard to the adequacy of the clients, defendants
11 advance several arguments.

12 First, they assert that my firm reached out to
13 Mr. Goldenberg and essentially manufactured this case. We
14 provided a certification for Mr. Goldenberg indicating that
15 he contacted Leonard Whitman, an ERISA attorney, who asked if
16 we would look at the case. We made no effort to find
17 Mr. Goldenberg. We frankly didn't know that Indel even
18 existed or FSC even existed.

19 Secondly, with regard to Mr. Pacheco, he provided a
20 certification indicating that once the case was filed, he
21 attended a meeting where certain criticisms were made of the
22 case and that prompted him to reach out to us to see if we
23 would be involved -- if he could be involved in the class
24 action.

25 Third, defendants advance the argument that

1 Mr. Goldenberg is not fluent in English and because he is not
2 fluent in English, he is not an appropriate class
3 representative. In *Turkcell* and in a whole slew of cases, the
4 courts have held that there is no obligation for a class
5 representative to be fluent in English. Defendants cite not a
6 single case that holds otherwise, and we could find none.

7 Defendants also point out that the class
8 representatives, Mr. Pacheco and Mr. Goldenberg with regard to
9 the Excessive Equity claim, skimmed the complaint or didn't
10 have a fundamental knowledge of the concepts which underlay
11 it. Your Honor, this is a highly complex area, ERISA is
12 terribly complicated and to try and hold plaintiffs to that
13 standard is simply inconsistent with the law. As this Court
14 held in the *Dupler* case, courts do not require plaintiff to be
15 the best possible or especially knowledgeable or especially
16 intelligent or understanding. As long as they have an
17 incentive to maximize recovery, they are adequate class
18 representatives. And that is all that is required under our
19 law, otherwise, common laborers who have been taken advantage
20 of as a consequence of sophisticated financial schemes, would
21 not have the possibility of participating as class
22 representatives in cases, and clearly that is not the goal of
23 our class jurisprudence.

24 Next we have to satisfy one of the 23(b) requirements.
25 And under 23(b), one, is there a possibility of inconsistent

1 or incompatible results? Because of that possibility, the
2 *Schering* case held that ERISA class actions are paradigmatic
3 examples of those that should be brought as class actions.
4 This Plan can have but a single equity allocation and if
5 multiple actions were brought, it's conceivable courts could
6 make determinations that different equity allocations are
7 appropriate. As a consequence, there is a possibility of
8 inconsistent or incompatible results, one court could find
9 that the investment in the Long-Short Funds were appropriate,
10 another that they were not.

11 And, finally, in *Stanford* the courts held in the ERISA
12 trust context that because you seek to essentially restore
13 money to a trust, there could be incompatible decisions of
14 different people who are beneficiaries of that trust took
15 different positions. So we respectfully submit that we
16 satisfy the Rule 23(b)(1) requirements.

17 In connection with 23(b)(3) there's a four-part test.

18 Number one, is there an interest of class members in
19 individually controlling prosecution of the litigation? This
20 is an extensive type of litigation requiring sophisticated
21 experts, individuals do not have the ability to control the
22 litigation. Secondly, even were an individual incentivized to
23 do so, any recovery belongs to the Plan as a whole, so, as a
24 consequence, there'd be minimal benefit to doing so.

25 The second test is are there other actions already

1 begun? Certainly we are aware of none and defendants have
2 cited none.

3 The third is desirability of concentrating claims in a
4 single forum. Clearly it's desirable given the fact that
5 there's just one recovery for the Plan, which must have one
6 asset allocation to have one court make that determination.

7 Finally, the difficulties in management, case
8 management. None are cited.

9 Measured by the 23(b) --

10 THE COURT: Let me ask a question on that point.

11 MR. A. LAKIND: Yes, your Honor.

12 THE COURT: This case, from the day that it was filed
13 until the day the class certification motion is actually being
14 heard, extends almost three years, that's the slowest in my
15 tenure on the bench that I can recall. Does that suggest that
16 this case is not manageable as a class action? It seems that
17 there's been more motion practice, more fighting just about
18 with everything, or would that happen in individual cases as
19 well?

20 MR. A. LAKIND: I think, your Honor, taking in
21 reverse, I think that would happen in individual cases because
22 some of the same issues that precipitated the disagreements
23 would happen -- it's not that we all have a bad relationship,
24 we actually have a good relationship, but that precipitated
25 these issues would arise.

1 And with regard to the issues that delayed the case,
2 number one, in the course of the case the Supreme Court
3 decided a case that we thought was significant with regard to
4 the need to demonstrate reliance in an equitable claim under
5 ERISA, so we made a motion to amend our complaint to add that.
6 Now, and we did not prevail on that motion, but there had been
7 a change of the law in the course of the litigation.

8 Secondly, both the *Behrend* and the *Sullivan* cases are
9 relatively recent origin and the application of that law
10 changed.

11 Third, because these cases tend to be expert intensive,
12 we felt, and I think defendants felt as well, it was incumbent
13 upon us to complete all fact and deposition discovery before
14 we asked an expert to render an opinion.

15 THE COURT: Do you think all fact and expert
16 discovery is completed now?

17 MR. A. LAKIND: With one exception. I think both
18 parties have not submitted their merits expert report. We
19 have not received the most -- I don't think we received the
20 most recent statements from defendants. But other than that,
21 this case will be complete once the expert reports and
22 depositions are done.

23 THE COURT: Okay.

24 MR. A. LAKIND: Your Honor, if I might, I'd like to
25 spend just a few minutes talking about the allegation that

1 there are conflicts among class members, and that will then
2 conclude my argument.

3 THE COURT: Okay.

4 MR. A. LAKIND: Your Honor, much is made in
5 defendants' brief of the notion that there are conflicts among
6 class members, some members would prefer a more aggressive
7 equity allocation, others less aggressive. We respectfully
8 submit that that, number one, is not accurate and, number two,
9 certainly does not undermine the application for class
10 certification.

11 First, this action is brought on behalf of the Plan as
12 a whole. So the issue before the Court is what is the optimal
13 asset allocation for the Plan as a whole taking into
14 consideration the demographic of the participant population.
15 So it's not what each individual prefers, it's what the Plan
16 prefers. And whether or not this case were to proceed on a
17 class action -- excuse, as a class action, that determination
18 would nonetheless have to be made, what is the appropriate
19 asset allocation. The benefit of proceeding as a class
20 action, is it permits greater court oversight of the
21 resolution of this case, should it be resolved amicably, and
22 an opportunity for participants, if they choose to do so, to
23 weigh in on the propriety of different proposed asset
24 allocations.

25 Secondly, the assumption of a conflict is based on a

1 notion that younger people prefer a more aggressive equity
2 allocation than older people. However, the question is not --
3 and here, incidentally, but 3 percent of the participants are
4 under age 40. But the question is not what is the asset
5 allocation a younger person would prefer, the question is what
6 is the allocation that a younger person would prefer knowing
7 that that same allocation would continue throughout their work
8 career until they become an older person. It's not just a
9 snapshot what somebody wants as a youth, it's what is the
10 propriety or the appropriateness of an asset allocation
11 throughout the history of one's employment.

12 Third, it is always the fiduciary's role to develop an
13 investment strategy that is optimal for the Plan. When
14 defendants developed their 80/20 proposal, clearly they sought
15 to reconcile the interests of every Plan participant. We
16 believe they did it erroneously but, suffice it to say, in
17 that instance they're always called upon to act for the Plan
18 as a whole.

19 Fourth, any conflict, to the extent there is one, and
20 we submit there is not, is attributable to the decision of the
21 defendants to employ a single investment strategy rather than
22 provide plaintiffs with the opportunity to choose their
23 investments or to provide individualized investment strategies
24 or a handful of separate strategies. It's the defendants that
25 insisted on having a single investment strategy and, as a

1 consequence, it's necessary to reconcile the interests of all
2 the participants in the implementation of that strategy.

3 THE COURT: Could there have been separate investment
4 strategies for the benefit of the participants --

5 MR. A. LAKIND: I appreciate --

6 THE COURT: -- under -- legally under this structure
7 of a Plan?

8 MR. A. LAKIND: We made the application -- in fact
9 one of the reasons that caused the delay is we made an
10 application to the court to say that there should be separate
11 investment strategies and we did not prevail on that. The
12 court ruled, and I think in retrospect we were probably wrong,
13 the court ruled that the Plan document allows Indel and FSC
14 the option to have a single strategy, and because that's
15 allowed it's not our position that it do anything different.
16 That is, frankly, what we thought. Now, that's not to say
17 they couldn't if they elected to do so but they could not be
18 mandated to do so. That again was one of the other amendments
19 that we sought to file in this case.

20 But, suffice it to say, the issue before the Court is
21 there must be a single investment strategy, the question
22 becomes what is the most appropriate for the Plan as a whole,
23 be it 80/20 or 50/50. Mr. -- excuse me. Dr. Pomerantz made a
24 suggestion of a plausible approach. It certainly is not the
25 only and the exclusive approach but it's an approach that

1 could be applied on a classwide basis.

2 Next, the *Unisys* court teaches that the fiduciary's
3 duty is to avoid large losses. So the question isn't what
4 necessarily is better for each individual but is the asset
5 allocation adopted by the defendants sufficient to avoid large
6 losses. We submit that Dr. Pomerantz's and other strategies
7 are preferable.

8 Finally, Lucy Allen, in the course of her expert
9 report, says that there might be disagreements among how
10 damages are allocated were we to prevail. However, the Plan
11 document, which we cannot impact, essentially states that
12 damages are allocated as a function of account balances, which
13 in turn is dictated that salaries that made the contribution,
14 so it's not that the younger people get one set of money and
15 the older people get another.

16 Your Honor, in advancing this argument I addressed a
17 number of issues that, frankly, go to the merits of the claim,
18 but *Behrend* and *Sullivan* do not require that. The inquiry on
19 commonality and typicality is simply limited to answering the
20 question is there a classwide wrong and can a methodology be
21 developed, whether that methodology is the best or reasonable
22 or speculative but can it be developed to allocate damages on
23 a classwide basis. By virtue of the contents of the Plan,
24 which provide how profits are to be allocated, that can be
25 accomplished. So we respectfully submit that plaintiffs have

1 met the burden to award class certification.

2 Unless the Court has any questions, that concludes my
3 argument.

4 THE COURT: You've moved for certification under
5 23(b)(1) and 23(b)(3), are they incompatible with each other?

6 MR. A. LAKIND: I'm sorry, your Honor, I didn't hear.

7 THE COURT: Are they incompatible with each other
8 because of the way that the two types of classes would be
9 managed? For instance, opt outs.

10 MR. A. LAKIND: I don't know so much that they are
11 incompatible but if we failed to meet one standard, I mean,
12 the courts have held that -- the district court has held in
13 *Smilow* that the 23(b)(3) standard is an easier standard for a
14 plaintiff to meet. So I think if we qualified under both, and
15 we seek to qualify in the alternative, we would have to adhere
16 to the most protective of the class in order to proceed.

17 THE COURT: And so if you qualified under both, you'd
18 go for 23(b)(3)?

19 MR. A. LAKIND: If that would be the most -- I think
20 that would be the most protective. Whatever would be -- yeah.
21 But we are advancing alternative arguments, your Honor.

22 THE COURT: Yes, I understand.

23 MR. A. LAKIND: Yes.

24 THE COURT: It just doesn't seem it could be both. I
25 mean, if you hit a home run here and qualify under both in all

1 four classes, that itself would have a degree of complexity --

2 MR. A. LAKIND: Yes.

3 THE COURT: -- that I don't think is necessary.

4 MR. A. LAKIND: Right.

5 THE COURT: And there would be an opting then of one
6 or the other, and it sounds like you would be opting for
7 23(b)(3).

8 MR. A. LAKIND: I think one of the complexities is
9 that under 23(b)(1) the possibility of incompatible standards
10 is so high if it's not certified as a class, because any
11 participant could bring an action and get a different result
12 on all four of the criteria -- excuse me, all four of the
13 claims.

14 THE COURT: When I used the word incompatibility, I
15 wasn't speaking to it in the 23(b)(1) sense. I was saying if
16 you have the same group of people and the same pension fund
17 and you have two competing theories of what this class is, one
18 under 23(b)(1) and the other under 23(b)(3), are those
19 theories in the end compatible when it comes to administering
20 the class? The notice requirements are quite different. The
21 consequences of being a member of a (b)(3) are different from
22 (b)(1). I think the Supreme Court has suggested, at least in
23 *Wal-Mart*, and that was a 23(b)(2) class, that those class
24 members aren't bound by the results if they didn't receive
25 actual notice. I mean, there's all kinds of problems --

1 MR. A. LAKIND: Right.

2 THE COURT: -- depending which avenue you go down.

3 MR. A. LAKIND: Right.

4 THE COURT: And so I just wanted to nail down,
5 assuming that you were successful on both, of which one the
6 plaintiffs think would actually be the best to achieve
7 justice.

8 MR. A. LAKIND: I would like to say 23(b)(1). But I
9 think if we meet both, I can't say that because in order to
10 qualify for 23(b)(3) there's certain prerequisites and I don't
11 think they can be ignored.

12 THE COURT: Okay.

13 MR. A. LAKIND: Okay.

14 THE COURT: Thank you very much.

15 MR. A. LAKIND: Thank you, your Honor.

16 THE COURT: Okay. And, Mr. Sawicki?

17 MR. SAWICKI: Yes, your Honor.

18 THE COURT: Good afternoon again.

19 MR. SAWICKI: Thank you for the opportunity to argue
20 before you, we very much appreciate it.

21 May it please the Court, I'm here on behalf of
22 defendants FSC and Wharton. Given the Courts ruling on
23 prohibited transaction claims, the other AIG related
24 defendants, SunAmerica entities and AIG, are essentially out
25 of the case, there is no substantive claim remaining against

1 them. So the focus of this class certification and the
2 remaining litigation in this case as to the merits relates
3 solely to FSC Securities Corporation and the Wharton Business
4 Group.

5 What I'd like to do, Judge, is provide some important
6 factual context and also expand upon the snippets of the law
7 that plaintiffs' counsel referred you to, and then I would
8 like to address the commonality prong of 23(a)(2) and the
9 existence of interclass conflicts that come up in the analysis
10 of 23(a)(3) and (a)(4), primarily (a)(4), which is the
11 adequacy requirement under class actions. Then Mr. Gentile,
12 who is counsel for the Indel defendants, will address Plan
13 structure in a little more detail and focus on the named
14 plaintiffs and their typicality and adequacy problems.

15 THE COURT: Okay. Sounds good.

16 MR. SAWICKI: Because of time constraints, of course,
17 we are not abandoning any of the arguments we make in our
18 briefs, we are simply focusing on what we think are the most
19 valuable for your consideration.

20 Now, we respectfully submit that the *Wal-Mart vs. Dukes*
21 case constitutes a substantive important change in the law of
22 commonality in evaluating class action certification
23 questions. Some of the key principles enunciated in *Wal-Mart*
24 *vs. Dukes* include that the class actions are the exception to
25 the usual rule that litigation is conducted on behalf of

1 individual named parties only. And, indeed, the Court just
2 harkened on that very issue when it asked questions related to
3 whether (b)(1) or (b)(3) would be the most appropriate means
4 to certify the class. It's our position that it seems plain
5 that certification under both is directly incompatible because
6 (b)(1) is a not opt out class, (b)(3) contemplates opt outs.
7 If you permit opt outs but you also certified the class under
8 (b)(1), you are inviting inconsistent results by those absent
9 class members. I just don't see how you can have both and why
10 one would select (b)(3) in this circumstance. And I'll come
11 back to those issues a little later in my argument, if I may.

12 *Dukes* changes the landscape of class certification law
13 because it requires, under the commonality prong of 23(a)(2),
14 that the plaintiff demonstrate the class members suffered the
15 same injury. There must be at least one common contention
16 that must be of such a nature that it is capable of classwide
17 resolution and, most importantly, the court said what matters
18 to class certification is not the raising of common questions
19 but rather the capacity of a classwide proceeding to generate
20 common answers apt to drive the resolution of the litigation.

21 In addition to these important principles under the
22 commonality prong, the law is well established under adequacy
23 23(a)(4), that the purpose of that investigation is to uncover
24 conflicts of interest between the named parties and the class
25 they seek to represent. And I would note for the Court that

1 there is indeed a Constitutional component to that inquiry.
2 Absentee members of a class will not be bound by the final
3 result if they were represented by someone who you had a
4 conflict of interest with them or who was otherwise
5 inadequate. That proposition was most recently included in
6 the *Spano vs. Boeing* case, a Seventh Circuit case in 2011.

7 In addition to those legal principles, the *Hydrogen*
8 *Peroxide* Third Circuit decision from 2009 instructs us that
9 the class certification decision requires findings, not merely
10 threshold showings. Indeed, that is precisely why the parties
11 were permitted and, indeed, encouraged to provide the Court
12 with evidence rather than merely an evaluation of the
13 allegations of the complaint. And I think the evidence,
14 especially weighing the party's respective positions, will
15 lead the Court to the right result.

16 This Court must resolve all factual and legal disputes
17 relevant to class certification even if they overlap with the
18 merits, including disputes touching on the elements of the
19 causes of action. And the Court's obligation is to consider
20 all relevant evidence and that argument extends to -- excuse
21 me. The Court's obligation is to consider all relevant
22 evidence and argument and that obligation extends to expert
23 testimony.

24 Your Honor, if you --

25 THE COURT: Would you agree that the record that's

1 been developed over these two-and-a-half years is about as
2 full as a class certification record can be?

3 MR. SAWICKI: Absolutely. We have completed fact
4 discovery. And as Mr. Lakind noted, all we have left to do is
5 the exchange of merits expert disclosures and the depositions
6 on those expert opinions.

7 THE COURT: Is the part of Rule 23(b) that says that
8 class certification motions should be presented and decided at
9 the earliest opportunity a dead letter? The rule makers saw a
10 benefit in presenting class questions early.

11 MR. SAWICKI: Understood. Well, as a practical
12 matter in this case, we are where we are. So I think we need
13 to go ahead and address class certification at this stage,
14 we're happy for the opportunity to do so. And, indeed, I
15 think the Court is benefited by the full record that you have
16 before you, you don't have to guess where the claims are
17 going, and I think it will give you a more informed decision
18 about whether this case is appropriate for class treatment,
19 which, of course, we say no.

20 THE COURT: Well, it certainly does, it gives a more
21 complete picture, and I'm certainly dealing with much more
22 than what's just inscribed in the pleading and all of that is
23 for the good. But let's say that the defendant were to
24 prevail in the class certification motion, it means that
25 you've gone to two-and-a-half years of effort that may not

1 have been necessary if this motion had been made much earlier
2 because it, you know, would have reached the same result, I
3 would think.

4 MR. SAWICKI: Well, obviously, my client regrets the
5 amount of time and litigation expense we've incurred in
6 dealing with this case. But again, we are where we are.

7 THE COURT: Right. And by my question, sir, I don't
8 mean to be critical. This is a very complicated case, it has
9 a lot of facets to it, I'm being asked to look at four
10 different class certifications, and so it's been deserving of
11 the time. And certainly I've given it a lot of time and I'll
12 give it more time going forward, I don't regret that either.

13 But I, like any federal judge, I'm interested in our
14 rules, in the rules of civil procedure. And although it was
15 softened about ten years ago when it used to say class
16 certification motions should essentially be the first order of
17 business in the case, so there's a little more flexibility
18 now, there still seems to be a preference that it be done
19 lickety-split despite what the circuit courts and the Supreme
20 Court are saying I have to be doing in terms of peeking at the
21 motions, at the merits.

22 MR. SAWICKI: Well, your Honor, all I can say is
23 that, as you well know, plaintiffs bear the burden on class
24 certification, it's their motion to bring. They had an
25 important hand, indeed, a leading hand in the course of this

1 case and when and how motion for class certification was
2 filed. They chose to wait till the end, maybe they thought it
3 was to their benefit or maybe, as I will show you, it was
4 because they continued to cast about for a potentially
5 relevant and viable theory, which we think they haven't even
6 yet done now. But -- and they've certainly had three years to
7 do so, so it makes one wonder about the viability of this case
8 as a class action for that reason as well.

9 Despite all this passage of time, your Honor, the
10 evidence that plaintiffs have submitted in support of their
11 motion for class certification consists of mere snippets of
12 the record. They rely almost entirely on the expert opinion
13 of Mr. -- or Dr. Pomerantz. They cite to a portion of the
14 Inductotherm Plan's Investment Policy Statement that
15 recommends an 80 percent equity, 20 percent fixed income
16 long-term target but they ignore the rest.

17 They gave you a couple citations out of context to the
18 depositions of Mr. Webster and Hembrough of Wharton Business
19 Group about whether age was considered. And then they also
20 included in their brief, but didn't even mention today, yet
21 another out of context sentence about whether manager
22 performance information was included in the monthly meeting
23 minutes.

24 In contrast to those snippets, your Honor, we have
25 submitted in opposition to the motion the full text of the

1 Investment Policy Statement, all of the monthly meeting
2 materials from all of the meetings that the trustees in
3 Wharton Business Group held during the five years relevant to
4 the claim in this case. We've shown what the actual asset
5 allocations changes were over time. And through Ms. Allen we
6 have given you a detailed analysis of the actual impact of
7 plaintiff's alternative approaches on each Plan participant's
8 account. On top of that we gave you extensive citations to
9 the testimony of the named plaintiffs themselves who are
10 purported to assume the mantle of class representatives. But,
11 as Mr. Gentile will explain to you, they full woefully short
12 on that score.

13 Judge, the first thing I wanted to show you is the rest
14 of the Investment Policy Statement. In part this bears on the
15 merits, but it's important to understand what this claim is
16 and what it is not and the disconnect between plaintiffs'
17 claim and what actually happened in this case.

18 First of all, part of the Investment Policy Statement
19 sets forth the Plan's investment objectives. Plaintiffs do
20 not challenge, and nor does Dr. Pomerantz make any opinion,
21 that these are invalid or inappropriate investment objectives.
22 I point the Court's attention particularly to No. 3, to
23 position the portfolio with longer term risk/return
24 orientation, thereby taking advantage of the higher expected
25 returns historically associated with investing the stocks.

1 There is nothing wrong with that as an investment objective
2 for an ERISA plan and plaintiffs do not contend otherwise.

3 By the way, that last few -- WBG and so forth, that's
4 the Bates number to that particular document.

5 The Investment Policy Statement continues on the next
6 page after it sets out the 80/20 long-term target that
7 plaintiff has referenced with this specific allocation
8 parameters that the investment managers and the trustees were
9 permitted to follow. So this was not a situation where the
10 trustees chose and FSC/Wharton implemented a static 80/20
11 asset allocation for the duration of the claim. The
12 Investment Policy Statement contemplated and these defendants
13 implemented a very active management. In fact we submit that
14 the attention paid and the active management undertaken by
15 these defendants exceeds the processes of virtually any other
16 fiduciary that may come before this Court. They met monthly.
17 The reams of materials that were provided to the trustees are
18 substantial. There was, even in between those monthly
19 meetings, there was calls and changes to the investment
20 allocations as we went along.

21 Now, these investment objectives they constitute the
22 aims of this Plan. And, as the Court well knows, Section
23 404(a)(1)(B) of ERISA provides that the fiduciary must act
24 with the care, skill, prudence, and diligence under the
25 circumstances then prevailing that a prudent man acting in a

1 like capacity and familiar with such matters would use in the
2 conduct of an enterprise of like character and with like aims.
3 And, as you well know, also, Judge, as a matter of law, ERISA
4 claims cannot be based on hindsight. And we submit, your
5 Honor, that plaintiffs miss the mark entirely on both of these
6 cardinal rules.

7 As I showed you with the Investment Policy Statement
8 excerpts, the defendants engaged in active management of this
9 Plan. Plaintiffs would have you believe that the investment
10 strategy undertaken during the 2006 through 2007 time frame
11 was static of 80 percent equities, 20 percent -- excuse me,
12 80 percent equities, 20 percent fixed income. Fixed income is
13 represented by the blue section, equities by the red.

14 This is in fact what happened, Judge. Every month
15 there was a meeting between the trustees and Wharton Business
16 Group and every month there was active evaluation of the
17 investments, the economic outlook, the markets, everything
18 they can conceive of that was relevant to deciding whether the
19 asset allocation should be changed to anticipate changes in
20 the market. This line here is what the S&P 500 was doing
21 during the same period of time.

22 Plaintiffs make some suggestion that the reason that
23 the actual allocations changes over time was simply because
24 the value of equities went up and down. That is demonstrably
25 not the case. We have provided the Court with --

1 THE COURT: Well, it has a tendency to be the case,
2 though, where the lines are converging. You have the S&P
3 dropping down in early 2009, it looks like, and so just
4 mathematically, I guess, the non-equity share peaks at
5 50 percent.

6 MR. SAWICKI: But that's necessarily true, Judge, I
7 mean, that's just --

8 THE COURT: But it's not the product of making a
9 different investment decision every month. You could have the
10 exact same amount invested in equities and when the portfolio,
11 the stock portfolio drops, the equity share goes up.

12 MR. SAWICKI: It would look like this. But that's
13 not what these defendants were doing. Here is one excerpt
14 from one of the board of trustees monthly meetings, "After
15 reviewing the performance of the investments and the stock
16 market, Wharton Business Group recommended a more defensive
17 position of 60/40 rather than 70/30." That's what happened
18 here. The stock market is going up and the defendants made
19 the affirmative decision to get more defensive because of
20 their evaluation of what was going on.

21 THE COURT: Right, that portion of the chart supports
22 what you said. Beginning about early 2008, though --

23 MR. SAWICKI: Sure.

24 THE COURT: -- I think things change, don't they?

25 MR. SAWICKI: Of course they do. I mean, this is

1 what the stock market did, but that didn't mean that the
2 defendants stopped being active managers. Before that time,
3 they, again, got more defensive, that's evidenced by the 2007
4 October meeting. August 2006, that's indeed before the stock
5 market took its big tumble, we again got more defensive based
6 on our analysis, we remained partially invested in equities.
7 And of course when the stock market goes down, the value of
8 those equities went down. Then again in 2009, even though the
9 market had bottomed here, we made the affirmative decision to
10 be more defensive, uncertain as to what was going to happen
11 next. The plaintiffs are using purely using hindsight to
12 invite the Court to second guess what the defendants were
13 doing at the time each month.

14 As I said, what I've shown you from the monthly meeting
15 minutes are merely examples. If you read them carefully, you
16 would see very active and careful management, attention to
17 grave detail, and a Herculean effort to do the right thing and
18 make it through this incredibly unusual and difficult stock
19 market period.

20 THE COURT: So as of March 11, 2009, in fact what was
21 recommended was a 50/50 split.

22 MR. SAWICKI: Yes, indeed. And plaintiffs would have
23 you believe we were at 80/20 the entire time.

24 Plaintiffs' theory is contrived on several levels.
25 First of all, as Mr. Lakind admitted to you, the Plan's theory

1 is a static one. It is divorced from any market
2 considerations. It's divorced from any of the other factors
3 that a seasoned or reasonable investment advisor might take
4 into consideration in deciding how to invest. And it is
5 driven purely as a function of one age calculation at one
6 point in time. They chose December 31, 2007, looked at the
7 demographics and Dr. Pomerantz said that the asset weighted
8 average age of this group of Plan participants is 56, and he
9 pulls out of thin air this 100 minus age approach and wants
10 the Court to impose this asset allocation strategy going
11 forward. From this point going forward. Not to stop here but
12 going forward.

13 Now, one of the things that the Court -- the plaintiffs
14 said that we don't want multiple actions and that's why a
15 class action is appropriate. This theory, your Honor, may not
16 invoke multiple actions but it certainly would invoke serial
17 actions. What's to stop one of the Plan participants at this
18 point in time when the stock market is going up, from coming
19 to the Court and saying this decision to remain at 44/56 under
20 these market conditions was a breach of fiduciary duty, it was
21 imprudent, we should have been more heavily invested in
22 equities. There's nothing to stop that sort of claim if you
23 accept this proposition. This theory also eliminates or does
24 not consider any of the active management that took place and
25 continues to take place as Wharton and the trustees continue

1 to manage this Plan in accordance with the investment policy
2 that they have adopted.

3 And certainly one of the most unnerving contrivances is
4 the period of time they've selected. Even though we
5 implement -- even though FSC came on board January 1, 2006,
6 and was operating under the same investment policy throughout
7 this period, plaintiff wants you to start at January 1, 2008,
8 and not take into consideration all the benefits that the Plan
9 garnered by virtue of the equity allocation during this period
10 of time. That is pure hindsight driven. It's litigation
11 driven. It is not process driven in any sense. And it is not
12 a conventional fiduciary duty claim.

13 THE COURT: Would it be appropriate to enlarge the
14 class retrospective to January 1st, assuming for purposes of
15 this question that all the other requirements for the class
16 certification are met?

17 MR. SAWICKI: No, because --

18 THE COURT: If the harm occurred on January 1st of
19 2006 --

20 MR. SAWICKI: Yes, your Honor.

21 THE COURT: -- you cited several cases for the
22 proposition that harm gain or loss is to be measured from the
23 date of the harm, so if there is to be a class, wouldn't it
24 have to start January 1, 2006?

25 MR. SAWICKI: We acknowledge that the cases say that

1 if there was a harm, it's a single harm and you would take the
2 entire class period. And in fact plaintiffs' theory
3 highlights, and their decision to cut off this group is one
4 example of the class conflicts they're creating by eliminating
5 the people who are in this, who participated in the Plan
6 during this period of time but not this period of time.

7 THE COURT: Well, can I remedy that in certifying the
8 class then that evens out what you say is the conflict by
9 extending the class back to January '06?

10 MR. SAWICKI: You could, but that would not help you
11 deal with all the other problems and conflicts that
12 plaintiffs' theory arises or creates. And let me speak to
13 those, if I may.

14 First of all, Judge, every case that the plaintiffs
15 cite in support of this optimal prudence date or to support
16 their theory predates *Dukes*. They continue to look for common
17 questions and they ignore the fact that they cannot find
18 common answers.

19 We've cited two ERISA investment cases post *Dukes*, that
20 is the *Groussman vs. Motorola* and the *Spano vs. Boeing* case
21 where the court -- the courts specifically denied class
22 certification on a finding that there were no common answers,
23 there was not a common contention that drove the resolution of
24 litigation, but a certified class would devolve into a myriad
25 of individualized issues involving all of the participants in

1 the Plan, not just a class representative or two. And the
2 reason that this myriad of individualized issues arises is
3 because plaintiffs' theory is predicated on the considerations
4 of a proxy individual. Plaintiffs give you no information, no
5 evidence to support the notion that what is proper for a 56
6 year old person has any application to an ERISA Plan that has
7 a long-term and in fact infinite life.

8 This Plan is not set up for Mr. Goldenberg or Mr. Loew
9 or Mr. Pacheco, it is set up for all Indel employees past,
10 present and future. For the trustees to begin to consider
11 Mr. Goldenberg's individual circumstances and preferences
12 necessarily causes them to disregard or fail to consider the
13 individual interests of other people, those then existing in
14 the Plan and certainly anyone going forward. Plaintiffs want
15 this Court to simply say as of December 31, 2007, the average
16 out weighted age is 56 and we're going to apply that going
17 forward no matter what happens in the Plan, no matter what
18 happens in the stock market.

19 THE COURT: Well, it may not be the greatest theory
20 but isn't it a plausible theory that a Plan may be managed to
21 average age of its beneficiaries?

22 MR. SAWICKI: No, your Honor, because plaintiff and
23 Dr. Pomerantz offer no support for that proposition. They
24 can't cite any other Plan that was managed that way. They
25 ignore the conventional wisdom related to the long-term asset

1 allocation of Plan assets and they want to impose this theory
2 created out of whole cloth. It is something they made up and
3 it's something, indeed, Judge, that they had three years to
4 cast about to find. They started with a morning star
5 concerted allocation theory; that didn't work because our Plan
6 did better. They then went to target day funds SunAmerica
7 20/15 and 20/20, those are all in their complaint, those
8 didn't work because the Plan beat the performance of that
9 asset allocation approach. They then went to these three --
10 these two theories that Pomerantz comes up with and they've
11 now settled on the 44/56. The 44/56 approach --

12 First of all, Judge, think of it this way, they've now
13 posited a 56 year old individual who is going to retire, if
14 not ten years, nine years, 15 years from now. That has
15 nothing to do with the Plan and it takes no consideration of
16 what the younger participants in the Plan want who are going
17 to be in it beyond the nine years or the 15 years that the
18 plaintiffs' theory posits should be taken into consideration,
19 that is there is no basis for that proposition other than
20 Pomerantz's own theory.

21 Now, contrasting --

22 THE COURT: You've mentioned that there's a myriad
23 of individualized determinations to be made and that
24 Mr. Goldenberg wants to pull the Plan in his direction, but I
25 don't see that that's what the plaintiffs are actually

1 arguing. They're arguing not for individual recoveries but
2 for a Plan wide recovery that maximizes the assets of the
3 Plan, they'll be able one day to have a little bit more money
4 in the Plan if they win this suit.

5 MR. SAWICKI: But that approach necessarily creates
6 conflicts between the class members because many of the class
7 members during this very period of time would be harmed if
8 this approach were put in place retrospectively. There were
9 several -- and let me jump to that point, if I may.

10 We provided the Court with Lucy Allen's report and what
11 she did was analyze the participants' individual accounts.
12 Now, plaintiffs would have the Court believe that this is
13 simply one pot of money and it's sitting there and you can add
14 to it and that makes one class issue that can be resolved in
15 this litigation. But even though it's one plan and one
16 account for investment purposes, the portions of that plan
17 account are allocated among the individuals and the
18 individuals have the opportunity to make contributions on
19 their own, to make withdrawals on their own, and their
20 individual accounts change as time goes by. This analysis by
21 Ms. Allen demonstrates that our Plan, when you consider what
22 the actual participants were actually doing in their
23 individual notional accounts, 20 of the people 60 years of age
24 or over out of 38 did better with the Plan than under
25 Pomerantz's 44 percent equity theory. In the group of 50 to

1 59 year olds, 38 percent did better under the Plan than under
2 Pomerantz's theory, and so on down the list. The total is of
3 all the 347 participants in the Plan during the periods 2006
4 through 2010, and we ended there because we only had year-end
5 information for 2010 when the accounts are trued up, fully
6 40 percent of that group did better under the Plan's actual
7 investment approach than Pomerantz's theory applied during the
8 same period to the same amounts. That is a fundamental
9 conflict.

10 This is not a situation where there are few class
11 members that could be defined out in order to achieve a class
12 resolution, that's almost half of the group. To look at it
13 another way, this shows --

14 THE COURT: Well, do the figures change if you use
15 2008 as the base year? Wouldn't it flip --

16 MR. SAWICKI: Yes.

17 THE COURT: -- pretty much?

18 MR. SAWICKI: But, Judge, this creates the problem of
19 them starting in 2008 versus 2006, which is the other conflict
20 we just discussed a moment ago. If you're going to say it's a
21 single breach, you must -- benefits and losses of the trustees
22 alleged breach and you come up with a result like this. If
23 you start in 2008, you're excluding the group that was in
24 place in 2006 to 2008 and that's an inappropriate conflict as
25 well. They can't have it both ways, they can't have it either

1 way.

2 THE COURT: Well, it sounds like the way you'd rather
3 have it, and I'm not saying I disagree, is that any
4 calculation relevant to the plausibility of their theory ought
5 to start in 2006, which is when the alleged harm occurred.
6 The harm that's being alleged against the defendants generally
7 is that a flawed and inflexible strategy was launched in 2006
8 by people who weren't competent to know what they were doing
9 because they hadn't been properly vetted. If that's so, then
10 these numbers by Lucy Allen have special relevance.

11 MR. SAWICKI: Yes, your Honor, because they point up
12 that there is not a common answer to the question. By
13 imposing by judicial fiat this revised and wholly new asset
14 allocation approach, you will have harmed almost half of the
15 class that you're seeking to certify and there's no basis in
16 the law for that. And that's precisely why *Dukes* is now
17 focusing our attention on common answers, and that's why the
18 *Spano* case and the *Groussman* case went into detail -- went
19 into the analysis of what happened in each individual's 401 or
20 their Plan accounts to see whether they were harmed or
21 benefited by the investments at issue at the time. And this
22 is precisely the same analysis and this is why you can't have
23 the class action.

24 THE COURT: But, sir, if every number on that chart
25 is correct, it doesn't mean that those people are going to get

1 a bill to send money back to the fund, it just means it's
2 going to diminish the recovery for the fund overall compared
3 to what it would have been, wouldn't it?

4 MR. SAWICKI: And that directly harms those other
5 individuals in this purported class who lost money because of
6 the way the assets were invested and the way their withdrawals
7 and contributions occurred.

8 Let me give you a prime example --

9 THE COURT: Are you really concerned about those
10 people?

11 MR. SAWICKI: I think the Court needs to be concerned
12 with those people because --

13 THE COURT: Everybody doesn't necessarily win when a
14 class is certified. The standard isn't that 100 percent of
15 the class members are demonstrably going to benefit. But the
16 defendant does have the opportunity to show that this Plan,
17 this plausible Plan that's been put forward by the plaintiffs
18 won't result in a net gain to the class, and you're close to
19 doing that. But if the plaintiffs do succeed, if there is
20 class certification, if they do prevail on the merits, it's
21 not like these people are going to be disadvantaged, the
22 40 percent, in fact they're going to be better off because
23 they're going to have a little bit more money in the fund than
24 they otherwise would have had were it not for this class
25 certification.

1 MR. SAWICKI: Judge, if you certified the class on
2 that basis and impose this unilateral static asset allocation
3 theory, this is not a case where they're just not benefiting,
4 they are being harmed, either they or the other participants
5 in the Plan who did suffer losses, they're getting less than
6 they should get because you're giving that money to the person
7 who had the net benefit already, that's a windfall. And you
8 just cannot reconcile those issues in this case context, it's
9 just too complicated, too many individual issues.

10 Let me give you a prime example, and plaintiffs
11 themselves provided it --

12 THE COURT: But again, it's the fund that gets the
13 money, not the individuals, if the plaintiffs prevail. So if
14 nothing is done, then nobody benefits at all. If something is
15 done and the plaintiffs prevail, then some people are slightly
16 better off and some people are a lot better off, isn't that
17 correct?

18 MR. SAWICKI: I think that -- but what the Court will
19 have done in that case is it will have harmed -- it will be
20 harming those who should be getting more under that theory and
21 providing windfalls to others for which there's no
22 justification.

23 Let me give you prime example, and that is --

24 THE COURT: But isn't the tension in that argument
25 the fact that individuals who might stand to gain a couple

1 thousand dollars from prevailing here aren't going to be
2 lining up at the courthouse door and filing lawsuits, they
3 can't afford to. And so to say it's not a perfect remedy
4 doesn't really say much, it's really this or nothing for the
5 class members, isn't it? Isn't that true with most classes?

6 MR. SAWICKI: Whether it's true of most classes or
7 not I'm not sure, but this class action would also affect
8 future investments on a go forward basis. And in fact this
9 ruling by this Court would not be viewed only by these
10 parties, but I'm told by my colleagues that there are 171,000
11 plans like this around the country. We would have a court
12 pronounced new method of asset allocation that because there's
13 no support for it that Dr. Pomerantz could find would create a
14 breach by every fiduciary for all 171,000 of those plans.

15 THE COURT: Well, that's quite a few jumps down the
16 board before you get to some sort of court ordered remedy.
17 The plaintiffs could win on class certification and lose on
18 the merits.

19 MR. SAWICKI: Yes, they could.

20 THE COURT: You could well prevail either on summary
21 judgment or to a fact-finder at a trial.

22 MR. SAWICKI: By certifying the class you have
23 guaranteed, the Court will have guaranteed that there are a
24 class full of conflicts and a number of individualized issues
25 as to who benefits by how much and who has to give money back.

1 Or if they don't give money back, from whose pocket are they
2 taking it, from their fellow participants? That's why we're
3 addressing these issues at the class certification stage.
4 Considering those issues at this point should lead the Court
5 to conclude that class certification is not appropriate.

6 This is not like the prohibited transaction claim that
7 was in this case originally and that you recently granted
8 summary judgment in our favor on, that's an example of an
9 appropriate ERISA class action claim because the Plan account
10 suffered one loss in the form of excessive fees and the
11 restoration of those excessive fees to the Plan is a single
12 issue that can be resolved on a class basis and the benefits
13 can be allocated appropriately among the class members.

14 This is substantively different because you're creating
15 an investment strategy through hindsight that has the effect
16 of -- that is based on not the consideration of the Plan's
17 aims, the Plan's goals, the Plan's structure, or the Plan's
18 time horizon, but rather on the aims, goals, time horizon, and
19 risk tolerance of a proxy individual who, by the plaintiffs'
20 calculation, is 56 years old. There is no one, virtually no
21 one in the Plan who is 56 years old. Mr. Goldenberg is 73, by
22 plaintiffs' own theory this 44/56 is inappropriate for him.
23 Likewise, Mr. Loew is 38, he should have a 61 percent or
24 62 percent equity allocation, according to their theory, yet
25 class certification would impose upon him a 44/56.

1 Plaintiffs do not dispute the basic premise of the
2 asset allocation models, that is, younger people should be
3 more heavily invested in equities because, based on historical
4 information, everything that Mr. Webster and everybody could
5 gather, that is the best long-term strategy regardless of
6 these unusual market gyrations. And that's proven
7 empirically. It's undisputed by plaintiffs. And the Court
8 would be superseding that by adopting this theory out of whole
9 cloth that harms those younger people and it likely harms the
10 older people as well.

11 The problem with this class action, Judge, is the way
12 the plaintiffs have approached it. They have not -- this is
13 not a case, for example, that trustees decided to take all the
14 Plan money and buy lottery tickets. They haven't alleged that
15 it is a breach of fiduciary duty for an ERISA Plan to buy
16 lottery tickets. First of all, that's not in the sole
17 interest of participants because it's benefiting the lottery
18 system or the education system, whatever it is, and nobody has
19 done that. It is demonstrably true that that is a breach of
20 fiduciary duty. This is a case where plaintiffs are not
21 disputing the investments that were made, the types of
22 investments that were made, they make no allegations that the
23 process that the individual defendants went through was
24 inadequate or inappropriate, that they did not consider the
25 right information, that they failed to meet or they failed to

1 make rational decisions in real time rather, they're simply
2 quibbling using hindsight with how they invested the money
3 during a specific period of time.

4 Now --

5 THE COURT: Now, you've suggested that any remedy
6 really that the plaintiffs come up with is going to be
7 arbitrary because it's going to benefit some people more than
8 others in the Plan. What is it that the fiduciaries do every
9 month when they have a single investment strategy that they
10 put into place, doesn't that benefit some more than others?
11 And no one would say that that's --

12 MR. SAWICKI: Yes.

13 THE COURT: -- antithetical to their duties.

14 MR. SAWICKI: Yes, but they did so on the basis of a
15 reasoned, rational process that was fully informed and
16 undertaken in real time. It was not a static 80/20 for all
17 time no matter what was happening in the market. Plaintiffs
18 cannot really say that this process was a breach of fiduciary
19 duty or invalid, they don't say that at all. They simply want
20 to take advantage of this market gyration to say that we would
21 have done something better.

22 Your Honor, that is true at every step of the way. You
23 and I could find an investment better than S&P 500 here and
24 here and here. That's not the Court's job. And I don't --

25 THE COURT: We can certainly look backwards and say

1 what could have been done.

2 MR. SAWICKI: Of course. And that's what the
3 plaintiffs are doing here, you see? And the reason it's a
4 problem is because they want it driven by an individual's age.
5 A Plan is not an individual. A Plan is a long-term investment
6 vehicle for the benefit of all participants. Looking at any
7 individual, whether it be a proxy or an average or
8 Mr. Goldenberg himself, would necessarily compromise the
9 interests of all the other individuals. That's why it's
10 inappropriate and that's why conflicts are created.

11 Let me finish with Mr. Loew. Remember him? One of
12 plaintiffs' representatives. He was in the Plan for only four
13 months, Judge. During that four months, his individual
14 account gained 10 percent, then he stopped participation in
15 the Plan. Plaintiffs initially put him forward as a class
16 representative on all claims, but then they withdrew him as a
17 class representative for the excessive equities class because
18 for the obvious reason he has no injury in fact. Yet they
19 want him to remain a class member, they haven't excluded him
20 from the class or excluded any group that made money. And for
21 the Court to pick those winners and losers and give a benefit
22 to someone like Mr. Loew who actually gained money during his
23 four months in participation in the Plan, is inequitable and
24 harms the interests of the other Plan participants or the
25 proposed class members.

1 There are no common answers to either what is a prudent
2 allocation for Plan participants if based on age, because this
3 age concept creates the conflicts among all the other members
4 who are not of the same age, and each class member was harmed
5 or benefited by the alleged breach and the Plan's proposed
6 remedy for it, and the interclass conflicts render the
7 plaintiffs inadequate to represent this class.

8 Your Honor, I should stop there so Mr. Gentile has a
9 moment to address some of the other issues we raise.

10 THE COURT: Thank you very much.

11 Mr. Gentile, good afternoon.

12 MR. GENTILE: Good afternoon, your Honor.

13 Good afternoon, your Honor. It's good to be here.

14 Let me give -- I first want to start with some
15 background into the Inductotherm Plan just to put all of these
16 issues in context, because then I think it will be a little
17 more clearer what conflicts are being promoted by the
18 plaintiffs' theory.

19 This Plan is a plan from Inductotherm, which, as you
20 know, is a privately held company started by Mr. Henry Rowan
21 back in the '50s. It's one of the leading producers of
22 induction furnace technology in the world. Mr. Rowan has been
23 very successful in his business, and early on he started a
24 profit sharing plan for his employees, which is, I'm told, one
25 of the longest such plans in the country. That profit sharing

1 plan has been remarkably successful over its now 55 or so
2 years of existence. The performance has been outstanding.
3 The Plan from the very beginning has been managed for the
4 benefit all participants. Participants are employees of the
5 Inductotherm companies.

6 The Plan is funded out of profits from the companies.
7 Every year there is a maximum contribution of 15 percent.
8 Those contributions have been made from the beginning.
9 They're discretionary with the company but they have been
10 consistently made.

11 The Plan is managed by trustees who are authorized to
12 make investments. They place the company's contributions into
13 a trust account. It's now held at PNC. Originally it was
14 Provident Savings Bank. The moneys placed in trust are then
15 invested in other assets, including stocks, bonds, and other
16 financial vehicles.

17 Other significant elements of the Plan, as I've said,
18 it's not a self-directed Plan in the sense that the individual
19 participants have any ability to own or control the
20 investments. The individuals simply take a fractional
21 percentage of the total Plan assets and they get a, for record
22 keeping purposes, a notional account which shows them every
23 year what their percentage ownership interest in the Plan
24 assets is.

25 The goal of the Plan, as we saw from the Investment

1 Policy Statement, is essentially to keep the Plan assets
2 growing so that they will be there to pay retirement benefits
3 to the participants on an ongoing basis into the indefinite
4 future. So, in other words, as the Investment Policy
5 Statement says, the idea is to take advantage of the
6 risk/reward orientation, the higher expected returns
7 historically from the stock market to take advantage of the
8 appreciation of those assets over time. So, in other words,
9 it's distinctly unlike a 401(k) plan, which was tailored for
10 an individual and it essentially has the time horizon that
11 ends with the individual's retirement from the work force.
12 Unlike the individual case, the Plan is an entity that is
13 meant to support and provide retirement benefits to the
14 employees of the Inductotherm companies.

15 The present population of the Plan in terms of
16 participants is roughly 250. Over the class period from 2006
17 until the present there are, I think, 347 participants because
18 people come and go, they retire, they leave the company, and
19 so forth, but the Plan assets are managed for the benefit of
20 all of those participants.

21 The participants in terms of demographics span the
22 spectrum, as we've seen from Ms. Allen's chart, from those who
23 are under age 30 and those who are over age 80. And notably
24 in the Inductotherm company, forward looking as it is, it has
25 no mandatory retirement date. So there's a number of

1 individuals in the Inductotherm companies who are over 65 and,
2 again, the Plan assets have to be managed for their benefit as
3 well.

4 Now, other key elements of the Plan, one of the other
5 key elements is that at age 55 the participants have the
6 option to start withdrawals from their Plan accounts, and they
7 can take up to 15 percent from their Plan account per year
8 once they hit age 55. And the trustee minutes, when this
9 amendment was adopted back in the '90s or early 2000's,
10 intentionally was designed to allow participants to withdraw
11 funds so they could invest them in whatever manner they wanted
12 as they approached retirement age. So in a sense the target
13 80/20 allocation of the Investment Policy Statement is
14 really -- you have to look at the off ramp that lets people
15 withdraw their money and invest it however they want. So, for
16 example, Mr. Goldenberg, who, by the way, began work at
17 Inductotherm in 1989 at age 50 and enjoyed a number of years
18 of very successful appreciation in his Plan assets, including
19 all of the years after age 60, and he didn't retire until age
20 71, he could have taken out of the Plan 15 percent of his Plan
21 account every year after age 55. Now, of course, he chose not
22 to do that, and he chose to retire when he did, and I'll get
23 into that when I discuss Mr. Goldenberg more particularly a
24 little bit later. But I think it's important for the Court to
25 note in terms of how the Plan was managed and what the options

1 that are for the beneficiaries or the participants, that this
2 option to take funds out at age 55 exists.

3 Now, one other thing that I wanted to mention about the
4 Plan, the structure of the Plan was the subject of motion
5 practice before Judge Donio back in November. The plaintiffs
6 sought to amend their complaint. And one of the reasons this
7 case has taken so long, your Honor, is there have been several
8 motions to amend the complaint. The motion to amend the
9 complaint back in November was opposed. The count that we
10 opposed, or one of the counts that we opposed, was a count
11 that would have asserted a claim that the trustees had to set
12 up segregated accounts in the names of each of the individual
13 members so that assets -- each of the individual participants,
14 so that assets could be individually managed and age, the age
15 of those participants should be taken into account.

16 Now, we opposed that and we challenged it, saying that
17 this is essentially a dispute over how the Plan operates. The
18 Plan does not have separate accounts for participants who own
19 their own assets. It simply -- it has an aggregate class of
20 assets that is managed for the entirety of the participant
21 class. And Judge Donio agreed with us and said, and I'm just
22 quoting here from Page 18 of Judge Donio's Opinion, "To the
23 extent plaintiffs allege that the Plan should have been
24 divided into different categories by age with a different
25 investment strategy for each age group and that this failure

1 to do so constitutes a breach of fiduciary duty, such an
2 allegation challenges the Plan's form and/or structure and it
3 does not implicate the fiduciary duty requirement set forth in
4 ERISA." So that claim was not made. But here we are today
5 and the plaintiffs are trying to do exactly the same thing in
6 a different guise. Through the back door they're asserting
7 that your Honor should impose a similar age based investment
8 strategy on all the participants even though the structure of
9 the Plan contemplates that those assets will be managed for
10 everyone's benefit, young and old, those with large Plan
11 accounts, those with small Plan accounts.

12 So, your Honor, that's by way of background and that's
13 by way of suggesting that this is not an appropriate case for
14 a class certification because the very nature of the theory
15 that the Plan should be taken to be similar to an IRA account
16 for an individual 56 year old worker, that is definitely --
17 it's totally incongruous. You cannot have a plan that
18 requires the trustees who have a class of 250 participants to
19 manage the plan as though all of those 250 participants are
20 now averaged into some kind of an avatar worker and you manage
21 those assets as if all the participants were an imaginary
22 being. It is not workable, it is not logical, and it really
23 defies the way the Plan was set up.

24 THE COURT: Do we know whether the Plan itself is
25 aging? Is the average age increasing each year in the Plan?

1 MR. GENTILE: Your Honor, we have some information on
2 that. I don't think that's the case. We have Mr. McShane's
3 certification in support of the -- in opposition to the
4 plaintiffs' motion for class certification, has divided the
5 account balances by age and it shows you, at least as of the
6 end of 2009 that those under 50 -- well, there are 241 total
7 participants as of that date, those under 50 number 128, those
8 over 50 number 113, and that excludes all of the individual
9 defendants in this case. I don't think the percentages have
10 changed over the last few years, your Honor. I don't think
11 it's aging, at least that's my information.

12 THE COURT: If there were that dynamic feature of the
13 Plan as each year went by, then would you agree age ought to
14 be a consideration of the fiduciaries?

15 MR. GENTILE: Well, your Honor, I guess I could
16 imagine a company in which the work force was entirely --
17 entirely consisted of workers who are 60 years old and over.
18 Harness manufacturers, cooper manufacturers, maybe, some
19 business that's dying as an industry, and in that case perhaps
20 you might then take into account age but the age would be --

21 THE COURT: Well, you wouldn't have to go that far.
22 It could be a casino where everyone under 40 gets laid off
23 because it's done by seniority and business is down. It's not
24 a farfetched example.

25 MR. GENTILE: True, your Honor, and I think you need

1 to -- I guess there are two things. One is what is the
2 horizon of these people to the point they retire and what are
3 the liquidity needs of the plan. Obviously, the plan would
4 have to consider the age of people. If the work force will
5 largely retire in the short-term, you want to make sure your
6 plan investments are liquid enough to pay them out, pay the
7 distributions that will be necessary.

8 And then the other point is what happens to people who
9 take their plan assets out, how do you guarantee that those
10 assets are used reasonably over the rest of their life until
11 they die? Okay? And that is really something that the Plan
12 and the trustees have no control over. The Plan here gives
13 the option, affords the option to participants to take up to
14 15 percent of their assets out but it doesn't mandate what
15 they can do with those assets.

16 THE COURT: And did you say that it is mandatory,
17 though, that they withdraw all of their money upon retirement?

18 MR. GENTILE: Yes.

19 THE COURT: And so you know that there's no retired
20 people in the Plan itself.

21 MR. GENTILE: That's true, your Honor.

22 THE COURT: Okay.

23 MR. GENTILE: As far as I know.

24 Now, if we -- now, of course, what they do after they
25 retire with the money is totally unknown, it's not in our

1 control. If you look at the -- and I'll examine the named
2 plaintiffs in that regard. Mr. Goldenberg took all of his
3 money, he retired in the depths of the stock market decline,
4 he took all of his money and on the advice of his
5 daughter-in-law, who is a financial planner, he put all of
6 those Plan assets into an annuity so he's essentially locked
7 in those gains for the rest of his life and I think he's
8 earning 5 percent or something a year, whatever he testified
9 to in his deposition.

10 There are other people like Mr. Loew who left the Plan,
11 he was only briefly in the Plan -- briefly employed by the
12 company. When he left, he took his Plan distribution and he
13 spent it, and in his deposition he admitted he has no
14 retirement savings whatsoever.

15 So again, your Honor, there's -- the Plan and the Plan
16 trustees, once the person retires and takes their money out,
17 there's really nothing we can do about how they spend it.

18 THE COURT: So setting up individual accounts, in
19 other words, is not the answer because it defies the structure
20 of the Plan itself.

21 MR. GENTILE: Correct.

22 THE COURT: But would you agree that the way that the
23 Plan is set up within the structure that it does have, that
24 the trustees have their hand on a lever, if you can picture it
25 in concrete terms, and that lever swings between 0 percent and

1 100 percent and they can choose to adjust it each month
2 consistent with the objectives of the Plan, is it not a
3 plausible theory for the plaintiffs to say that the way that
4 that lever has been managed is a breach of duty because it
5 hasn't come close to maximizing returns, it hasn't looked at
6 the real conditions in the market, any of the other criticisms
7 that should be leveled, and why should the plaintiffs be
8 required to do something more than what the fiduciaries
9 themselves are expected to do, which is identify where on this
10 lever you want the answer to be each month?

11 MR. GENTILE: Well, your Honor, I think the trustees
12 have done more here and, as Mr. Sawicki briefly outlined, the
13 management of the Plan assets is really a dynamic model. It
14 is constrained and there are standards on what they can do,
15 and it's not 0 and 100, it's up to 20 percent in cash and
16 fixed income assets, up to 80 percent in equity instruments.
17 The actual ratio is set as the trustees determine according to
18 market conditions and investment opportunities on
19 recommendations of professional investment advisors. And I
20 think that is a -- in terms of the discretion that the Plan
21 trustees have, that's an appropriate model. And I think the
22 question here is given that the trustees have an instrument
23 that sets forth standards, the plaintiffs are saying we've got
24 a better idea and the better idea works during this period of
25 historic market declines but it doesn't work over the lifetime

1 of the Plan, it doesn't work over Mr. Goldenberg's 22 year
2 period of employment.

3 THE COURT: Well, that may be, but isn't that
4 something it is determined at the time of trial?

5 MR. GENTILE: Your Honor, we could have -- you know,
6 every time there's a market decline, somebody through the
7 benefit of hindsight wants to say we should have invested in,
8 you know, one of four different models, the courts would be
9 deluged with those claims. It cannot simply be in hindsight
10 you could have done something different to increase the
11 returns. And I think especially you should not be able to do
12 that when you're doing it only in the period of time during
13 historic market collapse, historic financial meltdown in late
14 2008 and 2009. And I think that's really a fundamental issue
15 in this case. If the plaintiffs are right that they have the
16 ability to challenge discretionary determinations made by the
17 trustees, and there is no allegation of fraud here, there's no
18 allegation of self-dealing here, the only allegation is I've
19 got a guy who has a better theory of how these should be
20 managed. And it seems to me that if once we go down that road
21 and permit claims based on hindsight analysis where the court
22 is having to second guess what the trustees did in terms of
23 picking various investments and allocating over fixed income
24 or equity investments over a period of time, then that
25 converts the courts into essentially being fund managers or

1 investment advisors, and I submit that's really not
2 appropriate and it's not what this case is about.

3 But let me turn to the individual plaintiffs here. I
4 did want to talk, because it's not simply commonality, we've
5 been talking about those, I want to talk about typicality and
6 adequacy.

7 Mr. Goldenberg. Mr. Goldenberg, as I say, is a -- he
8 retired at age 71 and, as I say, there's no mandatory
9 retirement. When he wanted to retire, he was advised by the
10 human resources manager at Inductotherm not to retire because
11 they told Mr. Goldenberg the stock market decline has been so
12 profound you should wait, you don't have to retire now, why
13 don't you wait a few months, wait six months or so, see if the
14 markets bounce back, because once you take your Plan assets
15 out you're not going to benefit from that rebound.
16 Mr. Goldenberg did not take that advice, he said his wife
17 wanted him to retire and take care of his grandchildren, he
18 had to retire. He didn't take, as I alluded to before, he
19 didn't take advantage of the 15 percent per year option to
20 withdraw from the Plan, so he retired at the rock bottom of
21 the stock market. As far as I know, no one else in the
22 company did retire. So Mr. Goldenberg has an aim that is
23 different from other participants and that's because, A, he
24 has a lot to make up for and he's more interested in
25 maximizing his financial recovery and, two, he's retired, he's

1 no longer in the Plan, so he could really care less about how
2 the Plan is managed in the future. And in that respect he's
3 markedly different than most of the other members of his
4 class. And, of course, he locked in his losses so he doesn't
5 really have the benefit of the Plan appreciation, which, as
6 the chart on the easel shows, did recover after the depths of
7 early 2009.

8 Why is Mr. Goldenberg an inadequate representative?
9 Even if he were -- well, first of all, he needs a translator
10 and we could not take his deposition without one. He has a
11 very limited ability to communicate. He relies on his wife to
12 do most of the analysis of written documents for him. His
13 wife -- his affidavit -- his wife's affidavit show were key in
14 interfacing between Mr. Goldenberg and his attorneys. His
15 daughter-in-law was the one who recommended his annuity. And
16 his involvement with the lawsuit is really remote, I would
17 say, because everything gets filtered through his wife and his
18 wife does most of the communicating. Mr. Goldenberg has a
19 very limited knowledge of financial matters in general. He
20 can't explain really what a stock is, what a bond is. His
21 view of what makes sense for the Plan is that it should avoid
22 stocks altogether because Mr. Goldenberg views those as much
23 too risky, so he prefers a very extreme allocation. And
24 again, the typicality requirement, the adequacy requirement
25 are intended to protect the absent members of the class. All

1 those beneficiaries who are still in the Plan, who can
2 communicate, who understand financial matters, who remain in
3 the Plan and would like their Plan assets to be diversified.

4 THE COURT: Well, are you suggesting that a class
5 representative in order to be adequate has to be sophisticated
6 and understand the ins and outs of the market?

7 MR. GENTILE: Not at all, your Honor. Your Honor was
8 absolutely correct that the named representatives do not have
9 to be the best representatives, and that is not my point. My
10 point is these named representatives of this class are
11 distinctly inadequate as compared to an average fellow, an
12 average laborer in the plant, someone who can communicate in
13 English who has a basic familiarity with rudimentary financial
14 matters. And Mr. Goldenberg I think fails either one of those
15 tests.

16 Now, Mr. Loew is another special case, even though he's
17 not an equity class representative, he is a representative on
18 some of the other -- or he was initially. And Mr. Loew was
19 briefly employed by Inductotherm, he left shortly after his
20 Plan contribution was made, I think four months after the
21 Plan -- the contribution was made to his account. He gained
22 10 percent in those four months so he had no injury whatsoever
23 under the Indel allocation or asset allocation. And in fact
24 Mr. Loew testified that given his age and his risk tolerance,
25 he is more likely to favor more aggressive investments than

1 the consecutive allocation that the Plan proposed. And in
2 fact his investment -- his risk tolerance is so extreme that,
3 after leaving Inductotherm, he embarked on a career as a
4 commodities futures option trader. And so we talked to him
5 about that, and he managed to lose a little bit of money and
6 he went on to another business. But he conceded at his
7 deposition his risk tolerance is not typical of the alleged
8 44/56 allocation that the plaintiffs would like to impose on
9 the class.

10 And this is the rest of why Mr. Loew is not adequate.
11 He's not in the -- he's not participating in the Plan at all.
12 He doesn't care how the Plan is managed in the future. He has
13 no stake in that outcome. Or, as Mr. Sawicki likes to say, he
14 doesn't have a dog in the hunt. So his interest again is in
15 maximizing the dollars he can take out.

16 Mr. Pacheco is perhaps the most interesting of the
17 three. He is the only one of the three named representatives
18 who is still employed by Inductotherm and is still a
19 participant in the Plan. And what makes Mr. Pacheco unique is
20 his age, of course, is at variance with the 44/56 allocation
21 the plaintiffs say should be mandated for everyone because he
22 really falls outside of those parameters. And since he has
23 been in the Plan, he has not used the Plan as a source of
24 retirement funds. In fact, what he has done is used it as a
25 basis to supplement his income. And every time there is a

1 contribution of his Plan account, he withdraws it, as he is
2 allowed to do, using a medical -- for medical purposes or for
3 hardship reasons, and so he has no retirement funds in the
4 Plan whatsoever. And again, Mr. Pacheco could care less
5 whether the Plan is invested consecutively or not
6 consecutively, whether the trustees invest it under the
7 Investment Policy Statement or whether it's invested under the
8 Plan Mr. Pomerantz -- the theory Mr. Pomerantz has. So again,
9 Mr. Pacheco is not a typical plaintiff representative of a
10 class, most of whom are participants in the Plan, most of
11 which use the Plan as a source of their retirement income.

12 What else does Mr. Pacheco have -- why is he not
13 adequate? Well, aside from the fact that he really has no
14 familiarity with financial matters, he has grievances with his
15 employer and has been disciplined, suspended. And if you read
16 his affidavit, which the plaintiffs have submitted in support
17 of their motion, you'll see that Mr. Pacheco has a series of
18 issues with his employer. Why does that not make him a
19 typical or adequate representative? Well, it's because the
20 class representatives, assuming he were their representative,
21 would not want Mr. Pacheco to be impeached, would not want his
22 credibility or his motivations questioned. They're entitled,
23 as a matter of fairness, to have a representative act for them
24 who is not likely to be susceptible to either of those, whose
25 incentives, when this case is resolved either through

1 settlement or matters of strategy, are not simply to maximize
2 what he can get out of the next Plan contribution, who has
3 some other incentive than to stick it to his employer because
4 of his grievances.

5 So all of those points, your Honor, I think counsel
6 strongly against the certification of a class that has these
7 named representatives at the head. And again, it's not that
8 we need to find the best representatives for the class, but we
9 need to find representatives who are adequate, who are not on
10 their face likely to be susceptible to these kinds of attacks.

11 That's all I was going to say, your Honor, unless you
12 had some questions for me.

13 THE COURT: No, I think you answered my questions.
14 Thank you.

15 Mr. Lakind, do you want the last word on this?

16 MR. A. LAKIND: Yes, if I could, your Honor.

17 Your Honor, could I ask counsel to put the investment
18 policy back on the screen, the one that showed the 50 percent
19 allocation?

20 Your Honor, if I might, let me begin by saying that
21 much of what was addressed in argument today goes to the
22 merits of the claims, not to their plausibility under Rule 23
23 analysis. And let me start by illustrating some of the
24 difficulties with the approach that defendants have taken.

25 First of all, defendants noted that in 2009 the Plan

1 experienced a 20 percent appreciation. They also stated that
2 in March 2009 they changed the asset allocation to be much
3 closer to that proposed by Dr. Pomerantz than the 80/20
4 allocation which was in the Investment Policy Statement. So
5 to the extent that there was appreciation and remedial conduct
6 that occurred in 2009 after much of the loss was sustained,
7 suffice it to say that from 2006, '7, and '8, until 2009 the
8 Investment Policy Statement called for a 20 percent allocation
9 to fixed income in cash and 80 percent to equities. As a
10 consequence, there's a period of time where there was a loss
11 until they came to a more appropriate asset allocation of
12 50/50.

13 Secondly, your Honor was shown a spreadsheet prepared
14 by Ms. Allen, and that spreadsheet was designed to demonstrate
15 that the proposal of Dr. Pomerantz was not in fact likely to
16 lead to an award of damages. In the course of her deposition
17 Ms. Allen acknowledged that that spreadsheet was prepared with
18 information provided by counsel and was inconsistent with the
19 brokerage statements that underlay the performance of the fund
20 and that explained the performance of the fund. As a
21 consequence, it's awfully difficult to consider the merits in
22 conjunction with a document that was prepared on the basis of
23 information provided by counsel which was not provided in
24 discovery.

25 Third, at Page 31 of her report, Ms. Allen acknowledges

1 that if the damage period were extended from January 2006 to
2 October 2011, plaintiffs would sustain damages of between
3 4.7 million and 6.8 million, which seems to be inconsistent
4 with the chart that was shown to your Honor.

5 Your Honor, I'm sorry this is a bit disjointed, but
6 your Honor inquired as to the reasons for the delay in the
7 prosecution of this action. One reason for the delay was when
8 we were prepared to proceed with class certification, we had
9 determined that expert testimony would likely not be required.
10 Defendants indicated to the magistrate judge that they were of
11 the view that expert testimony would be required. In view of
12 that, a determination was made on our end, given the holding
13 in *Hydrogen Peroxide*, that we did not want to proceed where
14 there was only one expert. So the reason for the delay or
15 much of the delay in recent times was attributable not only to
16 amendments but to defendants' decision to proceed with expert
17 testimony, which, frankly, given the scope of the inquiry we
18 felt was unnecessary.

19 In addition, defendants showed to your Honor an
20 Investment Policy Statement which listed the three goals of
21 the Plan. Goal number one was the preservation of capital and
22 liquidity. Clearly that did not happen in 2008. Clearly that
23 goal is not compatible with an 80/20 asset allocation.

24 One of the counsel indicated that there's a difficulty
25 in allocating damages should they be recovered, this is

1 different than the prohibited transaction claim. However, the
2 damages in the prohibited transaction claim are identical to
3 what the damages would be here but for a different theory and
4 a different amount, they can be allocated in the same fashion.
5 The Third Circuit in *McMahon vs. McDowell* made it very clear
6 that actions of this nature against a fiduciary result in
7 recoveries that belong to the Plan as a whole. Inasmuch as
8 the recovery belongs to the Plan as a whole, it's up to the
9 Plan to make that allocation, not the Court. Insofar as the
10 Court would be called upon to make that allocation, the Court
11 has available the very Plan itself which says how it should be
12 done, which is a function of the amount in each account, not a
13 function of age.

14 THE COURT: Well, do you accept that there are a
15 substantial number of members of the class who would not be
16 benefited by the 44/56?

17 MR. A. LAKIND: No, that suggestion was incorrect.
18 Every single member except the few that left would be
19 benefited. And the reason for that is as follows, between --
20 let's go back to the 2006 date and use Ms. Allen's numbers.
21 Between 2006 and 2009 or '10, I forget, I think it's 2010 she
22 used in her report, she said there was \$4.7 million in
23 damages. That \$4.7 million would then become a Plan asset.
24 That Plan asset would then be distributed to all the Plan
25 members, not as a function of age but under the Plan document

1 itself as a function of the account balance. So there may be
2 a few that left but there's no more than 38, according to
3 their numbers, that some left when the market was high and
4 some low. But, suffice it to say, that when the Plan -- were
5 the Plan to recover either the 4.7 million or a different
6 amount, that would be allocated to every Plan member. Age is
7 absolutely irrelevant to the allocation. Absolutely
8 irrelevant.

9 Then you come to March 2009 and their argument is
10 contradictory. Because they say, well, in March 2009 some
11 Plan members might want a more aggressive allocation than
12 that proposed by Dr. Pomerantz. But they provided exhibits to
13 the Court which said they essentially reverted to the
14 Dr. Pomerantz model in March of 2009 or fairly close to it.
15 So the damage period probably spans a period between either
16 2006 and 2008 or 2009, but there's one absolute recovery for
17 the Plan as a whole and that recovery is allocated to every
18 single member as the function of the amount they had in the
19 Plan at the pertinent time. It is simply inaccurate for
20 defendants to suggest that a large portion of Plan members
21 would not be benefited.

22 Now, what Dr. Pomerantz did is exactly what defendants
23 did, he proposed a possible, what he referred to as a prudent
24 standard for an asset allocation. It's not definitive. It's
25 not suggested that this is the only asset allocation, but that

1 age should be considered and taken into account and here is
2 one way in which to do it.

3 What your Honor didn't hear is what methodology
4 defendants used. The defendants have not throughout the
5 entirety of this case suggested how they came to that 80/20
6 methodology. They didn't have anything -- any information on
7 Plan demographics, which they're required to consider when
8 developing a methodology, so there's no basis before the Court
9 now to even suggest that another methodology is better or
10 different.

11 Your Honor inquired of counsel what percent of the
12 members are below certain ages. I don't know the answer but I
13 do know based upon the reports 3 percent of the assets are
14 held by individuals under 30 years of age. 3 percent.

15 Insofar as defendants contest the --

16 THE COURT: Well, let's look at those members of the
17 class, they're the 3 percent that are under age 30. And
18 you're proposing a certain mix of equities and non-equity
19 investments. What's the answer to the argument that's been
20 made that you are going to be disadvantaging the younger
21 members of the class?

22 MR. A. LAKIND: Okay. I think the following. Number
23 one, as an individual if I were to invest and I were
24 significantly younger, I would be comfortable with an
25 aggressive equity allocation. But if someone said to me as

1 part of this plan, the price I pay for that aggressive equity
2 allocation when I'm young is that when I'm old, I get that
3 same aggressive equity allocation, I'm much less comfortable
4 with that. So the question isn't --

5 THE COURT: But 30 year olds don't think they're ever
6 going to grow old.

7 MR. A. LAKIND: Happens so fast. You'll see.

8 (Points to Robert Lakind)

9 MR. A. LAKIND: So the question really I don't
10 think -- this is isn't as if they had private investments on
11 the side, this is a situation where once they sign onto an
12 equity allocation, that allocation was going to stay with the
13 plan until they got out, so it's a little bit different than
14 saying what the young prefer.

15 THE COURT: Well, you've also criticized the
16 fiduciaries for being inflexible, for seizing upon a certain
17 answer, 80/20, and rigidly keeping it. And there is a defense
18 to that that says, no, it was adjusted periodically and here's
19 the proof. But let's say that you're correct and that it was
20 rigid, what's been proposed is a rigid solution of 44/56.

21 MR. A. LAKIND: It is not -- I'm sorry, your Honor.
22 Dr. Pomerantz didn't describe it as a rigid solution, he said
23 it's a prudent allocation, it's an approach to show that
24 damages can be allocated. We are not suggesting that it's got
25 to be 56/44 from here on out, we're suggesting that if age

1 were considered, this would be a starting point and the
2 allocation would inevitably vary as it has here to some
3 extent.

4 THE COURT: But what would color the exercise of
5 discretion, what would change the 44/56?

6 MR. A. LAKIND: Well, one of the things they said in
7 one of the reports, for instance, if the market is
8 particularly tumultuous, they might consider departing from
9 the equity allocation they developed. I think at times when
10 the market seems to have appreciated rather rapidly it's
11 probably prudent to the begin to reallocate to bonds. I mean,
12 the fact of the matter is over the last ten years, statistics
13 show bonds have been a better investment than stock. I mean,
14 one of the things the fiduciary has to do is bring their
15 judgment to it. But a fiduciary cannot exercise that judgment
16 unless it has information, and this fiduciary had none.

17 THE COURT: Well, they had information about the
18 performance of the financial markets.

19 MR. A. LAKIND: Right.

20 THE COURT: And met each month to address those. Do
21 you accept that?

22 MR. A. LAKIND: Oh, I think they did, but they knew
23 very little or nothing about the demographics of the Plan. I
24 mean, Ms. Allen suggested a broader inquiry than that of
25 Dr. Pomerantz, she said you look at years to retirement, risk

1 tolerance, and assets outside the Plan. So there was a whole
2 slew of information as to -- that should have and could have
3 been gotten. Dr. Pomerantz lacked the ability to develop that
4 other information because in the context of preparing a
5 report, the only thing he had was the age, which he said was a
6 surrogate for other variables, but a fiduciary should rely on
7 demographics and they did not.

8 THE COURT: Well, has Pomerantz relied on whether the
9 fund is aging or growing more youthful?

10 MR. A. LAKIND: Yes, he prepared a draft in which he
11 showed the concentration of wealth and age in different
12 strata, so that is what he considered.

13 THE COURT: But did he do a comparison, I don't
14 recall one, that would compare the age of the fund, the
15 average age of the fund in '06 versus in subsequent years?

16 MR. A. LAKIND: No, he did not, your Honor.

17 THE COURT: Because if age is so important and if the
18 average age is what we should use to manage the fund, wouldn't
19 it be important to know whether the fund itself is aging or
20 the fund itself is tending to get younger because there's more
21 younger hires entering?

22 MR. A. LAKIND: Yes, I think the answer to that is it
23 would be. But it's something that an outside expert would
24 have difficulty doing because we don't know who left, what
25 their age was when they left, and things of that nature, we

1 only have the composition of information we're given. So we
2 don't know who left in 2006, who could have left in 2007, et
3 cetera. In fact -- I won't mention that now.

4 Your Honor, finally, with regard to the adequacy of the
5 class representatives, I don't think there's much to add with
6 Mr. Goldenberg, he does rely on his wife and his daughter who
7 is a financial planner, and there's no case law that says
8 that's inappropriate. And although it wasn't briefed in
9 defendants' brief, the case law is extensive, every single
10 circuit that's examined the issue has held that even when you
11 leave a plan, you still have standing to sue on behalf of that
12 plan because when the plan recovers, the plan can allocate and
13 consider your participation at the time when you were in the
14 plan. We didn't brief it, defendant didn't brief it, but I'm
15 familiar with the law and that is clearly what the law is.

16 Mr. Loew, he is --

17 THE COURT: He may have standing to bring his
18 individual suit, but is he typical of the class members? It
19 seems that someone who's no longer in the plan would be more
20 indifferent to the plan's performance, wouldn't they?

21 MR. A. LAKIND: I think he would be more indifferent
22 once he left the plan. But insofar as he takes the position
23 that the starting point should have been 56/44 while he was in
24 the Plan, he has the same stake as everybody else and that's
25 what he's advocating for. And he's not saying there should be

1 a different stake once I leave, but he has -- he clearly,
2 under the -- and again, I don't have the cases off the top of
3 my head but the circuits have been pretty standard in holding
4 you retain standing to bring a class certification even after
5 you leave the plan.

6 THE COURT: Well, isn't he at the other end of the
7 spectrum really from Mr. Pacheco in terms of risk tolerance
8 and what they would like to see the Plan doing?

9 MR. A. LAKIND: He is, but I think that's important
10 in having different class representatives. Again, it was not
11 briefed, but some of the case law is that if you have a broad
12 spectrum of interest, you're more likely to get an adequate
13 class representation.

14 I think I indicated Mr. Loew is not proposed as the
15 representative of the equity Plan. And with regard to
16 Mr. Pacheco, counsel indicated that he had withdrawn much of
17 his money from the Plan. That was done when he had some
18 medical issues and his nephew had some medical issues. There
19 was nothing improper about that. It was done on notice. He
20 was instructed that's how to proceed. That certainly does not
21 make him different than any other representative.

22 Your Honor also inquired of me and I gave an inartful
23 answer as to which of the 23(b) prongs is appropriate for this
24 case. In *Schering Plough* the Third Circuit at 589 Fed.3d 604
25 said that in a 502(h) claim, which this is, the claim is most

1 appropriate as a 23(b)(1) class.

2 Your Honor, I believe I mentioned that -- I think I've
3 covered everything unless the Court has any other questions.

4 THE COURT: Just a moment while I've got you here.

5 I think one of the important points of the defendants'
6 argument is that the theory put forward by your expert is one
7 of looking backward and second guessing decisions that had to
8 be made especially during a financial crisis. What would be
9 your response to that?

10 MR. A. LAKIND: My response, your Honor, is that age
11 is relevant whenever an allocation is made, Plan demographics
12 have to be considered. And while it happened that the market
13 deteriorated in 2008, the report of my expert -- of our expert
14 says that age should have been considered at the outset when
15 an allocation was made because that's the best way to preserve
16 the capital, which is the principal goal of this Plan.

17 Another advantage of considering age, which the federal
18 regulations indicate should be done and principally pretty
19 much every authority, is that unlike the 80/20 goal age is
20 going to vary as younger employees are hired, the equity fixed
21 income allocation will change. So not only will it change --
22 could it be changed as a consequence of conditions in the
23 market, but it will change as a consequence of the
24 demographics of the Plan members, something that defendants
25 did not consider.

1 In closing, let me just return to the burden upon us in
2 this class action certification, which is to essentially put
3 forth a plausible theory of liability, not necessarily a
4 colorable claim.

5 THE COURT: In considering what those two terms mean,
6 plausible and colorable, where's the line between it? How
7 will I know what's plausible if the adversary has a pretty
8 strong answer to all of it?

9 MR. A. LAKIND: Your Honor, I think, at least reading
10 from case law, it's hard for me to know where the line between
11 plausible and colorable is, but the notion that age should be
12 considered and was not is far more implausible. That's the
13 basis of our liability claim, that there is an obligation to
14 consider age in developing a Plan allocation, and that
15 assertion is consistent with the *Bogosian* case, it's
16 consistent with the *GIW* case, it's consistent with the goal
17 *Unisys* articulates to preserve capital. If age is not
18 considered, how can capital be preserved in a Plan if people
19 are going to retire and take their money. It's consistent
20 with the federal regulations. It's consistent with what the
21 SEC says, it's consistent with what FINRA says.

22 I mean, I would submit, your Honor, not only is the
23 notion that age should be considered plausible, but to suggest
24 otherwise, defendants to suggest otherwise is simply improper.
25 Mr. Webster in his deposition said we have to consider the

1 individual circumstances. Ms. Allen in her report and
2 deposition acknowledged age should be considered. FSC didn't
3 have the age and certainly didn't have the right age. So I
4 would respectfully submit that our claim is far more than
5 plausible.

6 THE COURT: No other questions on class
7 certification.

8 MR. A. LAKIND: Thank you very much, your Honor.

9 THE COURT: Okay. Thank you.

10 All right. I'd like to move on in the time that's
11 remaining. I'm going to reserve decision on the class
12 certification motions, and I appreciate your arguments on both
13 sides, they're provocative.

14 We have a little bit of time if you would like to speak
15 to the issue of the motions for partial summary judgment as to
16 the several counts of the amended complaint, and so we're
17 speaking of Count One and Count 26, is that right?

18 MR. GENTILE: That's correct, your Honor.

19 THE COURT: Okay. So as to Count One, failure to
20 adopt a Trust Agreement in accordance with the Plan. Seems
21 like I've been here before, but what would you like to add?

22 MR. GENTILE: Well, your Honor, our original motion
23 was one to dismiss. And, in accordance with the motion to
24 dismiss standards, we didn't have the opportunity to submit
25 material outside the record. And in fact I reread your

1 Opinion denying our motion and chastising us somewhat for
2 trying to include something that was not in the pleadings or
3 on the face of the pleadings, so --

4 THE COURT: It must have been a mild chastisement
5 because I --

6 MR. GENTILE: It was a very mild --

7 THE COURT: -- reread it and I didn't pick that up.

8 MR. GENTILE: Very mild.

9 We're here today, we have a complete record, the claim
10 is that the Plan does not have a Trust Agreement and that the
11 absence of a Trust Agreement leaves the trustees without
12 standards for exercising their investment discretion. So
13 there are two answers to that, and the simple answer is that
14 they're wrong on both counts.

15 First, there is a Trust Agreement and the Plan has
16 always had a Trust Agreement. The Plan back at its inception
17 in 1956 had a single integrated document, which was both a
18 Trust Agreement and a Plan and it was so captioned as Profit
19 Sharing Plan and Trust Agreement of the Inductotherm
20 Engineering Corporation in 1956. These documents are all
21 attached to the certification of Mr. Barndt in support of the
22 motion. The first sentence reads "This Trust Agreement."
23 Article H of that document refers to trustees of the trust
24 established pursuant to the provisions hereof. The document
25 is replete with language that reinforces the idea that the

1 Trust Agreement is contained in that document. From 1956
2 onward the Plan and Trust Agreement have been treated
3 consistently as an integrated whole. When the Plan and trust
4 went to get letters from the Internal Revenue Service, the
5 Internal Revenue Service responded saying the Trust and the
6 Plan comport with their Internal Revenue Code regulations.
7 1976 there was a restatement and amendment of the existing
8 Profit Sharing Plan and Trust Agreement into another document.
9 The Profit Sharing Plan and Trust Agreement has continued from
10 that date forward. The recent -- the more recent Plan that's
11 the subject of this action is the 2002 version, which is
12 captioned Profit Sharing Plan but refers in it to the Trust
13 Agreement that predated that Plan.

14 So if you go back in time, I think it's clear that
15 there is a Trust Agreement historically. The Trust Agreement
16 allowed for the creation of a trust account at Provident
17 National Bank, which through various iterations of the
18 financial community is now PNC. So the original trust account
19 is at PNC, the contributions that are made from the company go
20 into that trust account, and from the trust account the funds
21 are disseminated or distributed by the trustees to various
22 investment vehicles. So that's how it operates.

23 The fact that Mr. McShane in August of 2009 answered
24 Mr. Goldenberg's inquiry with the -- about where the Trust
25 Agreement is, he said there is no separate Trust Agreement,

1 which is absolutely true, there is a single integrated
2 document that is both the Plan and the Trust Agreement.

3 So all of that is factually true and is supported by
4 the documents that we've assembled. ERISA does not mandate
5 that the standards for trustee discretion be contained in a
6 Trust Agreement. And we've recited the relevant provisions of
7 ERISA under Section 402(b). Procedures for establishing a
8 funding policy are provided for in the Plan. Procedures for
9 allocating responsibilities among those operating and
10 administering the Plan are set forth in Plan Section 8.2. The
11 procedure for amending the Plan is set forth in Plan Article
12 10. The basis on which payments are made to the Plan and from
13 the Plan are set forth in Articles 4, 5, and 6 of the Plan.
14 All of those written documents constitute Plan instruments and
15 satisfy ERISA.

16 THE COURT: Well, by saying that the Trust Agreement
17 exists although it's not a separate document, and you refer to
18 the PNC bank account, if the PNC bank account is the
19 manifestation of the Trust Agreement because it's a trust
20 account, then that doesn't explain the language in Section 5.2
21 of the Plan that I previously examined, and it said
22 investments of contributions is governed by the provisions of
23 the Trust Agreement and it says that in the Plan.

24 MR. GENTILE: Yes.

25 THE COURT: I took that to mean that there's another

1 document called a Trust Agreement that would say how
2 investment of contributions is to be done, and the reason I
3 did that is because otherwise the language of the Plan
4 wouldn't make sense. And so if a Trust Agreement is nothing
5 more than a bank account that holds things in trust, then that
6 doesn't direct the way that contributions are to be invested.
7 So where is the Trust Agreement, where would one find it? Or
8 are you saying as a matter of law it's just not necessary to
9 have a document called a Trust Agreement?

10 MR. GENTILE: Well, I'm making both of those
11 arguments, your Honor. I'm making both of those arguments.
12 One, there is a Trust Agreement and historically the document
13 that is the Trust Agreement I think is a 1956 or '57 document,
14 which is attached to Mr. Barndt's certification. Thereafter,
15 it was incorporated by reference into the Plan, carried
16 forward from that date and amended, as I say, in 1976. So
17 that document is there, it is part of the Profit Sharing Plan
18 today. Does it set forth the terms that govern the trustees'
19 discretion in terms of investments? I would say the bank
20 account is the place that is the repository of the
21 contributions made by the company and the bank account is the
22 source of proceeds that go into the various investment
23 vehicles. So in the sense it does satisfy Section 5.2 but
24 ERISA doesn't require that the Trust Agreement provide those
25 precise standards to guide the trustees' discretion.

1 And here the Plan itself is very specific and detailed
2 and sets forth every requirement that is necessary under ERISA
3 Section 404. And even if -- and, of course, the Investment
4 Policy Statement, which governs the trustees' conduct during
5 the class period, and it was adopted in December of 2005 at
6 the very inception of FSC/Wharton's role as an investment
7 advisor, so it's continuously been in effect. That investment
8 policy statement, as your Honor knows from the documents we've
9 put up on the screen and the documents we've submitted to you,
10 has very carefully drawn sets of asset allocation standards
11 and provisions covering what investments can and cannot be
12 made by the trustees. So that document, in addition, would
13 satisfy the investment standards and make clear that there are
14 standards for the trustees to exercise their discretion.

15 And if nothing else, the whole issue of whether there
16 is a Trust Agreement, what it says is, I think, put to rest by
17 the Plan provision, which gives the trustees the authority to
18 resolve any possible conflict in interpretation. And they're
19 authorized to do that in Section 8.9 of the Inductotherm Plan,
20 which basically -- it basically says if there is a conflict or
21 a question of how do you interpret these documents, the
22 trustees have the power to do that. And there's really
23 nothing untoward about their construction of the Plan to
24 incorporate by reference the Trust Agreement, the Investment
25 Policy Statement has all of the standards. And, moreover,

1 your Honor, I fail to see what damage whatsoever would befall
2 the class as a result of the fact that there is no Trust
3 Agreement.

4 So for all those reasons I think we've sufficiently
5 proven that there is a Trust Agreement under our investment
6 guidelines.

7 THE COURT: Okay.

8 MR. GENTILE: Let me turn to lack of prudent
9 investigation, Count 26.

10 So the Third Circuit standard is whether the
11 fiduciaries have engaged in the appropriate methods to reach a
12 decision. And it's not whether the Court could imagine there
13 would be more thorough or different means of investigation or
14 different investigation or the plaintiffs as attorneys and
15 class representatives could imagine a different scenario.

16 But here the record is quite clear the trustees went
17 through a very careful process when they selected a new Plan
18 investment advisor in 2005. They carefully vetted a number of
19 candidates, most of whom were very large financial firms.
20 They had a very comprehensive series of meetings where people
21 came in and made presentations to them about their investment
22 strategies and how they would manage the Plan. The trustees
23 narrowed down that list to two finalists. Wharton Business
24 Group and FSC were one of the finalists and ultimately they
25 were selected.

1 I would note that all of the potential candidates
2 presented an investment allocation model that is far different
3 from the ones proposed by the plaintiffs here and is more akin
4 to the one -- the target allocations and the actual
5 allocations that were adopted by the trustees.

6 So the selection of Wharton was made. In addition to
7 the meetings and screenings, Wharton presented a three ring
8 binder full of materials. They sat down with the trustees
9 over two sessions and were questioned about their investment
10 philosophy, how they would manage the Plan, how they would
11 communicate. They manifested their willingness to hold
12 monthly meeting with the trustees. Their target allocation
13 was not very different from the one that the prior investment
14 manager Hewitt had recommended. And when Hewitt left, I think
15 the investment allocation at the time was 73/27, 73 percent
16 equities, 27 percent fixed assets.

17 Mr. Krupnick's testimony about what he did in terms of
18 due diligence on Wharton Business Group and FSC is in the
19 record. His testimony was that he vetted them by reviewing
20 materials on the Internet and on the SEC website to see
21 whether there were any adverse reports or disciplinary
22 infractions, he found none for Mr. Webster and Mr. Hembrough
23 who are the Wharton Business Group representatives. The only
24 support the plaintiffs have that this was an inadequate
25 investigation are a series of emails that Mr. Krupnick wrote

1 and exchanged with Wharton Business Group in the summer of
2 2009 that they say means he didn't do an investigation
3 beforehand. Mr. Krupnick testified about those emails and his
4 certification, which is submitted in support of our motion,
5 states that what he wanted was to update his files because
6 Wharton -- he had learned that Wharton Business Group was
7 thinking about a reorganization or some kind of corporate
8 restructuring, he wanted to know the facts concerning that and
9 whether he might have to change any Plan documents as a
10 result. So those were the impetus -- that was the impetus for
11 the communications, and the plaintiffs' inference that they
12 suggest a lack of any prior due diligence is simply not there
13 on the record.

14 THE COURT: Well, his emails don't specifically
15 mention update or seeking update. Isn't it just as inferable,
16 this being a summary judgment motion the plaintiff gets the
17 benefit of reasonable inferences, that what Mr. Krupnick was
18 doing was asking for information that he didn't already have?

19 MR. GENTILE: Yes, your Honor, that's exactly what
20 they will infer. And the inference by itself would be
21 plausible were it not for Mr. Krupnick's deposition testimony
22 and his certification, both of which explain what the emails
23 meant. And he wrote the emails, there's no other source of
24 that information. Plaintiffs had the opportunity to take his
25 deposition. They've taken the deposition of Mr. Webster and

1 Hembrough, had the opportunity to ask them whatever they
2 wanted about those. They can't now in response to a summary
3 judgment motion rely simply on inference and speculation about
4 what a document means, especially when the document was
5 authored by Mr. Krupnick and he's given the testimony about
6 what it meant.

7 THE COURT: Okay. Thank you.

8 Mr. Lakind?

9 MR. R. LAKIND: May it please the Court, your Honor,
10 Robert Lakind on behalf of plaintiffs.

11 First, your Honor, I'd like to address Count One, which
12 is plaintiffs' claim that the defendant breached their
13 fiduciary duty by not adopting a Trust Agreement.

14 It is respectfully submitted that in the course of this
15 litigation defendants have taken three positions with regard
16 to the existence of a Trust Agreement. First -- I apologize,
17 Judge, which was prior to this litigation. In August of 2009
18 the defendants sent Mr. Goldenberg a letter which stated that
19 there is no separate document entitled a Trust Agreement.
20 Then with their motion to dismiss in December of 2009, in
21 their papers they said that there is a Plan and Trust
22 Agreement and attached a document claiming to be a -- a
23 separate document claiming to be the Trust Agreement. Now
24 their position is that the Plan and Trust Agreement are one
25 integrated document.

1 For two reasons it is respectfully submitted that the
2 Plan and Trust Agreement are not an integrated document.
3 First, the defendants state on Page 8 of their motion since
4 the inception of the Plan in 1956, the Plan has been a single
5 integrated document. They cite to Exhibit B of their
6 declaration to support their position that it is a single
7 integrated document. Exhibit B is a document that is first
8 dated in 1957 and on the last page of that document, which
9 presumably is a, maybe a draft document, reflects that that
10 document was never executed and signed, thus, that document
11 was never in effect.

12 Secondly, the current Plan, which is the 2002 version
13 of the Plan, specifically states that it is the Inductotherm
14 Company's Master Profit Sharing Plan and it is an amendment
15 and restatement of a Plan that was originally adopted in April
16 of 1976. Therefore, the defendants' current position is that
17 they were integrating an unexecuted 1957 document into a Plan,
18 the 2002 version of the Plan, which specifically states it's
19 an amendment and restatement of a Plan originally adopted in
20 1976.

21 Additionally, for one other reason plaintiffs disagree
22 with the defendants' position. First it is contradicted by
23 the plain meaning of the Plan. The Plan specifically states
24 in Section 8.1, on numerous occasions it refers to a Plan and
25 Trust Agreement. And as your Honor noted in Section 5.2(a),

1 the Plan specifically states that the investment of
2 contributions will be governed by a Trust Agreement. Thus,
3 the plain language of the Plan and the fact that the
4 defendants have previously attached a document claiming to be
5 the Trust Agreement clearly suggests that there is a separate
6 document entitled Trust Agreement. In fact, this Court has
7 previously ruled that the language of the Plan implies that
8 there is a separate document entitled a Trust Agreement.

9 I would just like to briefly address the arguments that
10 were raised by counsel, which were that ERISA does not require
11 a Trust Agreement, that the Wharton Business Group Investment
12 Policy Statement suffices in place of the Trust Agreement,
13 that there was no loss on account of a failure to adopt the
14 Trust Agreement, and that deference is owed to the
15 fiduciaries' current interpretation.

16 First, with respect to the argument that ERISA does not
17 require a Trust Agreement, the Plan specifically states that
18 the investment of contributions will be governed by a Trust
19 Agreement. ERISA 404(a)(1)(D) explicitly provides that a
20 fiduciary must operate a Plan in accordance with its Plan
21 documents. Therefore, if the Plan states there shall be a
22 Trust Agreement to comply with ERISA 404(a)(1)(D), there
23 needed to be a Trust Agreement.

24 The importance of a Trust Agreement in this Plan should
25 not go unrecognized. First, this is not a pension plan, it is

1 inured to the participants, are they allowed to direct their
2 investments in this Plan. And as FSC stated, unlike the more
3 common 401(k) plan, participants cannot direct their
4 investments, therefore, investment guidelines were of crucial
5 importance to this Plan.

6 Next, the defendants have suggested that the Wharton
7 Business Group Investment Policy Statement may take the place
8 of the Trust Agreement. First, as noted, the Wharton Business
9 Group Investment Policy Statement is not a Trust Agreement, it
10 is a document produced by the service provider.

11 Secondly, as noted earlier, the 2002 version of the
12 Plan specifically states that it is amending and restating a
13 Plan previously adopted in 1976. Exhibit Y to the defendants'
14 declaration is a copy of that 1976 version of the Plan. That
15 specifically requires the diversification of investments of
16 the Trust so as to minimize the risk of large losses, and
17 that's in Section 4.34, your Honor. I respectfully submit an
18 80/20 allocation is not an allocation that's diversifying the
19 risk of large losses.

20 Additionally, in the same provision of the Plan that
21 requires the adoption of a Trust Agreement with investment
22 guidelines, the Plan states at least annually the committee
23 shall review all pertinent employee information and Plan data
24 in order to establish the funding policy of the Plan. The
25 Wharton Business Group Investment Policy has nothing in it

1 about the employees.

2 Further, Section 5.2 of the Plan also states that there
3 shall be accounts in the Trust Agreement under which the
4 participants may direct their investments. There is nothing
5 in the Wharton Business Group Investment Policy Statement that
6 contains accounts for the participants to direct their
7 investments.

8 Further, the defendants also suggest in their papers
9 that a Trust Agreement -- the Wharton Business Group
10 Investment Policy Statement can service as the Trust Agreement
11 because it contains the following language, and this is the
12 quote from their brief, your Honor, "The investment
13 advisor/representative do have the ability to recommend a
14 holding of up to 50 percent of the portfolio in cash or short
15 term bonds." Not only is that provision very close to what
16 Dr. Pomerantz is recommending, that provision was added to the
17 Investment Policy Statement after this case was initiated.
18 That is a statement in the 2009 version of the Investment
19 Policy Statement, not the Investment Policy Statement that was
20 in effect prior to the initiation of this case.

21 Additionally, your Honor, the Investment -- Wharton
22 Business Group Investment Policy Statement was adopted in
23 2005. The Plan, which requires a Trust Agreement, took effect
24 in 2002. It seems impractical to believe that a 2005 document
25 could control for a Trust Agreement that was supposed to be in

1 existence in 2002.

2 Finally, your Honor, I believe that this is a matter
3 more for expert testimony as to whether the Wharton Business
4 Group Investment Policy Statement suffices as the Trust
5 Agreement. Plaintiffs have their merits expert report ready
6 to go and they could provide it to the Court or the defendants
7 and their expert witness who -- their merits expert witness
8 who formerly managed all the retirement plans for American
9 Airlines, has opined in that report that this Investment
10 Policy Statement would not suffice as a Trust Agreement
11 because a Plan of this type you would have age -- something in
12 the Trust Agreement that age of the participants needed to be
13 considered.

14 Next, your Honor --

15 THE COURT: Is that part of the record that's before
16 me today?

17 MR. R. LAKIND: No, your Honor, I apologize, it's not
18 before you.

19 THE COURT: So I really can't consider it.

20 MR. R. LAKIND: No, that's correct, your Honor.

21 THE COURT: Okay.

22 MR. R. LAKIND: Next, your Honor, the defendants have
23 suggested that the absence of a Trust Agreement does not in
24 any way incur a loss to the participants. First, that
25 argument was made for the first time in their reply and,

1 therefore, it's respectfully submitted it should not be
2 considered by the Court.

3 THE COURT: It's actually one of my questions, and
4 I'll give you the opportunity to respond to it, is there --
5 how would you go about reckoning the loss from the failure to
6 have a Trust Agreement?

7 MR. R. LAKIND: Your Honor, if there was a Trust
8 Agreement, there would have been investment Guidelines in
9 place. And since we are here on a motion for summary judgment
10 where inferences are supposed to be construed most favorable
11 to the plaintiffs, I think that's more an issue for expert
12 testimony. And, as I said and as you know, your Honor, it's
13 not currently before your Honor, our expert would testify to
14 the fact that the Trust Agreement, had it existed for this
15 type of Plan, a prudently drafted Trust Agreement would have
16 stated the age of the participants should have been considered
17 in implementing the Plan's investment strategy. While our
18 expert testimony is not yet before the Court, there is well
19 established caselaw in our brief which sets forth the fact
20 that a motion for summary judgment should not be resolved in
21 advance of the submission of expert testimony.

22 Finally, your Honor, the next argument raised by the
23 defendants is that their interpretation --

24 THE COURT: I'm sorry, let me interrupt for a second.
25 I thought that the record was complete on these motions

1 for summary judgment, I didn't receive a 56(d) application
2 from the plaintiffs saying let's wait, it's premature, or soon
3 we'll have an expert report and we want to submit that. Isn't
4 the briefing complete?

5 MR. R. LAKIND: Your Honor, in our brief we explain
6 that we believe the motion was premature because merits
7 experts reports had not yet been exchanged. We may have
8 faulted there not doing it through the formal 56(d) process.

9 THE COURT: Well, often that kind of statement would
10 be accompanied by a proffer at least like a 56(d) affidavit
11 would read this is what we would be adducing or this is what
12 we would like to do. But just to have a general statement
13 saying expert discovery is not concluded, it doesn't tie the
14 knot that 56(d) requires of you, does it?

15 MR. R. LAKIND: No, your Honor. I guess if possible
16 if we could ask for leave, within a week we could have that
17 affidavit to you.

18 THE COURT: Well, I already have a great deal to
19 consider here. What was the date of the expert's report? Do
20 you know how recently it was prepared?

21 MR. R. LAKIND: The expert who was going to opine on
22 the Trust Agreement, his report was complete a few months
23 back, and then what happened, an Order was issued that delayed
24 the exchange of merits expert reports until the completion of
25 the class certification motion.

1 THE COURT: Well, that only set a deadline for you.
2 Nothing said you couldn't supply it before the deadline or
3 supply it as part of your summary judgment opposition. I'm
4 just reluctant to let the record float along, I hope you'll
5 understand.

6 MR. R. LAKIND: Yes, your Honor.

7 THE COURT: Also, your submitting it just about
8 guarantees that I get an equal and opposite request then for
9 leave to submit the defendants' response to your expert's
10 report. So I'd say that it's too late to submit the report
11 for purposes of this motion and that, you know, I'll decide it
12 based upon the record that does exist, bearing in mind, of
13 course, the inferences that you're entitled to as the party
14 opposing the motion.

15 MR. R. LAKIND: Yes, your Honor. If I could then
16 fall back on my position that it was an argument raised in
17 reply, it wasn't in the moving papers regarding loss.

18 The final argument I'd like to address, your Honor, is
19 that the defendants have suggested that their interpretation
20 that they have an integrated document is entitled to
21 deference. The Supreme Court in *Cartwright vs. Frummer* has
22 stated that fiduciaries are entitled to deference so long as
23 their interpretation is reasonable. I respectfully submit
24 that the defendants' interpretation is not reasonable because
25 they have taken three different positions; first in August of

1 2009 there was no separate document entitled a Trust Agreement
2 with the filing of their motion to dismiss, then there was a
3 separate document entitled Trust Agreement, and now with their
4 current motion the Plan and Trust Agreement are an integrated
5 document with the defendants seeking to integrate a draft
6 Plan, which the last page of that Plan reflects was never
7 executed or placed into effect.

8 Unless your Honor has any questions, I was going to
9 move on to the next count if that's acceptable.

10 THE COURT: Let's move on.

11 MR. R. LAKIND: Okay. Count 26 of plaintiffs'
12 complaint alleges that the Indel defendants breached their
13 fiduciary duties in not first conducting an investigation of
14 FSC, and then also it imposes liability stating had they
15 conducted that investigation they would not have retained FSC.
16 The two FSC employees who were responsible for managing the
17 assets of the Plan were a Mr. Hembrough and a Mr. Webster.
18 It's not disputed that the deal requires that a fiduciary,
19 prior to retaining a service provider, look into the
20 experience and skill -- experience of those individuals in
21 managing retirement plans of similar size and complexity.

22 The defendants with Exhibits B, C, and D to
23 Mr. Krupnick's declaration have attached various documents
24 claiming that this demonstrates that they conducted a
25 sufficient investigation. Exhibit B, your Honor, is just

1 simply minutes saying that they interviewed Wharton Business
2 Group. Exhibit C and D are the Wharton Business Group's
3 proposal for how the assets of the Plan should be managed.
4 That's very different than investigating whether that service
5 provider is qualified to manage the Plan. While it's a
6 rudimentary analysis, I think it's the equivalent of allowing
7 a doctor to do a complex treatment without checking to see
8 whether the doctor is qualified to render that treatment.

9 The defendants claim that we are misinterpreting the
10 email from Mr. Krupnick to Mr. Webster. And what the email
11 does state is "What I would like to address now and annually
12 hereafter is information from Wharton along the following
13 lines, information about the firm itself and information about
14 personnel including the qualifications." They claim that we
15 are misinterpreting this email and that these questions were
16 asked at the onset when FSC was retained. However, in
17 Mr. Krupnick's declaration -- Mr. Krupnick's deposition, which
18 is attached as Exhibit K to my declaration on Page 189, Lines
19 15 to 17, he testified as follows when asked about these
20 questions.

21 Had you asked these questions of either of them in the
22 past?

23 No, I relied on FINRA's website and the information on
24 the website for FSC and Marc and B.J.

25 That clearly suggests that these questions were not

1 asked in advance of FSC's retention.

2 Additionally, Mr. Krupnick's testimony contains other
3 evidence that these questions were not asked.

4 THE COURT: Well, if he's saying he relied on their
5 website, why wouldn't that suffice?

6 MR. R. LAKIND: I think a website is more of an
7 advertisement and I think to manage a Plan with 250
8 participants with over \$50 million, I think the investigation
9 would have to go beyond what would be that of just simply the
10 website. And the website is not going to give information
11 about Mr. Hembrough's and Webster's experience in managing
12 plans of a similar complexity -- a retirement plan of similar
13 complexity and size.

14 THE COURT: Do you know what the website showed that
15 he looked at?

16 MR. R. LAKIND: We do have pages of what the -- the
17 website, I do know, although it's not in the record, did not
18 reflect anything about managing a plan such as this one.

19 But one thing that suggests that maybe that review of
20 the website wasn't so in-depth is Mr. Krupnick here is
21 testifying that he relied on FINRA's website and FSC's
22 website. Through FINRA's website he should have discovered
23 that the Wharton Business Group is not registered with the
24 SEC, and it seems that might have raised a red flag that would
25 have been placed in the trustees' minutes, and there was

1 nothing to suggest that fact was discovered.

2 Additionally, there's other evidence with respect to
3 Mr. Krupnick's testimony. When he was asked do you recall
4 asking Mr. Webster and Hembrough for their educational
5 background, he stated I don't recall doing that. When asked
6 do you recall asking them about their work history, he says I
7 don't recall the work history. When asked did you ask them
8 about their experience representing other plans, he stated no.

9 Similarly, in Mr. Hembrough's deposition, the employee
10 of FSC, when he was asked were you asked for your customer
11 list, he said I don't believe so. When he was asked were you
12 asked for your references, he stated I don't know.

13 Regarding the experience, both Mr. Hembrough and
14 Webster testified that they had no experience managing
15 nonparticipant plans in which investments were not directed by
16 the participants. In fact in the past ten years prior to the
17 retention, they had only managed five 401(k) plans. They were
18 mostly managers of individuals' money which is very different
19 than managing a complex retirement plan with over 250
20 participants.

21 Some evidence about the lacking of experience,
22 Mr. Hembrough testified as to having never seen the investment
23 proposal that was prepared for the Plan until his deposition
24 in this case. Additionally, when he was asked what was the
25 purpose of the restricted investment section in the Investment

1 Policy Section, he stated I don't know. These quotes were all
2 provided for your Honor in our papers.

3 THE COURT: Yes.

4 MR. R. LAKIND: One other, counsel suggested that the
5 Wharton Business Group may have been an adequate investment
6 advisor because their competitors had put forth similar equity
7 allocations. All of their competitors' equity allocations
8 were below that of what Wharton proposed.

9 Additionally, we don't know what information was
10 provided to those service providers or what information was
11 requested. But what we do know is after Wharton started
12 working with the Plan, rather than this 80/20 asset equity
13 allocation, in March of 2009 they recommended a 50 -- an
14 allocation of 50/50, meaning 50 invested in fixed income, 50
15 invested in equities. Similarly, after the initiation of this
16 litigation, they amended the Wharton Business Group Investment
17 Policy Statement, I believe it's on Page 2, to state that an
18 equity to fixed income allocation of 50/50 is permissible.

19 Your Honor, for the foregoing reasons I believe that
20 there is a genuine dispute of material facts, especially when
21 the facts are construed in the light most favorable to the
22 nonmoving party.

23 Unless your Honor has any additional questions I have
24 nothing further.

25 THE COURT: No, I don't, not on that.

1 MR. R. LAKIND: Thank you.

2 THE COURT: Okay. Anything else?

3 MR. GENTILE: Your Honor, if I can say one thing?

4 THE COURT: Okay. One minute.

5 MR. GENTILE: First in response to the assertion that
6 we had not made the argument about no damage from the absence
7 of a Trust Agreement, in our original brief at Page 19 there's
8 an extensive footnote in which we made that argument that the
9 Count One would fail for the independent reason that
10 plaintiffs cannot show any causal relationship between the
11 failure to adopt a Trust Agreement and the claimed damages.
12 And then we cite in support of that several cases and Judge
13 Donio's ruling in February of 2012. So I think that argument
14 was made, and if the plaintiffs haven't responded to it or
15 chose not to, that's not our fault.

16 The other argument I would respond to is the
17 investigation argument. The plaintiffs would have your Honor
18 believe that there was no investigation at all done of
19 FSC/Wharton's capabilities. Obviously these same two
20 individuals, Mr. Webster and Hembrough, were managing
21 Mr. Henry Rowan's investments, his personal investments and a
22 number of his family and portfolio companies since the late
23 1990's. So there was an extensive track record of their work
24 managing very substantial funds on behalf of one of the
25 trustees.

1 Secondly, Mr. Krupnick testified, and the record is
2 really not contradicted in any way, Mr. Krupnick went to the
3 FINRA website, which would have any reports of adverse
4 disciplinary, any disciplinary infractions, disciplinary
5 history, criminal prosecutions, and so forth, and found none.
6 And he went on the website of FSC and Wharton Business Group
7 to investigate the backgrounds and find out what the website
8 said with respect to their qualifications. So in both of
9 those respects there was an investigation. The plaintiffs
10 would have had your Honor believe that if there were some
11 additional investigation done, the trustees would not have
12 selected FSC and Wharton Business Group and there's nothing at
13 all in the records to support that, your Honor.

14 THE COURT: There's no allegation that the trustees
15 were somehow duped into thinking that the fiduciaries that
16 they were hiring had prior experience, is there?

17 MR. GENTILE: No, not at all, your Honor.

18 THE COURT: All right. I'm going to reserve decision
19 then on the partial summary judgment motions.

20 On the defendants' motion to preclude Dr. Pomerantz and
21 the plaintiffs' cross-motion to preclude Lucy Allen, certainly
22 both sides have touched on what they perceive as the
23 shortcomings of those experts' reports even in your oral
24 arguments. Are you content to rest on your briefs in those
25 regards?

1 MR. A. LAKIND: Plaintiffs are content, your Honor,
2 we submit on our briefs.

3 THE COURT: Okay.

4 MR. LEVIN: Your Honor, I would just -- my name is
5 David Levin and I represent the defendants with respect to the
6 *Daubert* motion.

7 And the Court asked whether or not -- earlier about
8 whether or not a plausible theory had been advanced. In the
9 complaint itself, both in the first complaint and then in the
10 second -- the first amended complaint and the second amended
11 complaint there are five different theories that are advanced
12 by the plaintiffs with respect to what's appropriate for
13 investing. The range, and we've provided the Court with the
14 material, the range of investment ranged from 0 percent in
15 equities to 70 percent in equities.

16 So the only theory that's now coming forward to you is
17 a theory that's only been advanced by Dr. Pomerantz. When you
18 asked whether it was plausible, the first question always is
19 is the enunciator of the theory one who can actually provide
20 that theory. And under 702, the first element is
21 qualification. And Mr. Pomerantz has -- Dr. Pomerantz has
22 stated that he has no experience and no education and no
23 familiarity with the kind of plan that's at issue in this
24 case, that's the nonparticipant directed Plan. And he -- so
25 he doesn't satisfy the qualification level even with respect

1 to it, so we don't even get to the questions of methodology
2 and fit.

3 But were you to get to the questions of methodology and
4 fit, the method that's been proposed by Dr. Pomerantz, as you
5 yourself said, your Honor, calls for something that's fixed.
6 And in fact in his report it is fixed, he used a fixed figure
7 56 and 44 using the hypothetical age weighted participant
8 subtracted from 100 and he applied that to every year.
9 There's nothing, no hint even in his report that it was
10 something that should be changed on a yearly basis, and that
11 information, the demographics were provided.

12 So even as to the methodology itself, we've never said,
13 the defendants have never said that age isn't a factor, I
14 don't know where that floats from, nor that the allocation was
15 80/20. In fact if you look at the Investment Policy
16 Statement, you'll see that it's a range. Dr. Pomerantz stated
17 that he didn't consider the actual investments that were made
18 by the Plan. He didn't test it and he didn't know the
19 percentages. His methodology, this creation of the
20 hypothetical participant based on age weighting and then
21 subtracting from 100, he himself has said he's never
22 recommended it to anybody who is administering a private
23 sharing -- a profit sharing plan. In fact, he's never
24 recommended it to anyone.

25 And when you look through methodology and the elements,

1 which are stated in our brief and I don't want to repeat them
2 for you, but when you look at that, when you see that there's
3 a theory that's been advanced by no one, that has no basis
4 whatsoever in the literature or the case law and that's
5 actually inconsistent with the regulations issued by the
6 Department of Labor. Why? Because the Department of Labor
7 has said what's consideration of the Plan, the participants as
8 a whole, which is what the Department of Labor says a
9 fiduciary of a nonparticipant directed investment plan is
10 supposed to do. They describe it and it has nothing to do
11 with taking every single participant and adding them up and
12 dividing it. In fact there's a separate, if you will, safe
13 harbor that allows for that, but that's not the way that the
14 Department of Labor says funds in this kind of plan are to be
15 invested.

16 So we have somebody who's proposed a methodology that
17 has no basis in the literature, that he's never recommended,
18 that he's never used outside of this litigation that's being
19 proposed to you. And the whole basis for the statement that
20 this is something that you have had to consider is the idea
21 that Wharton didn't know anything about the demographics. But
22 Wharton didn't pick the target allocation. In fact if you
23 look in the record that we've presented to you, Hewitt, who
24 was the investment advisor through 2005, had already
25 recommended 70/30 as the allocation. Wharton recommended even

1 as the target, and, as you saw, there's ranges, it's not
2 fixed. Wharton recommended 70/30 or 80/20. The trustees
3 picked the 80/20. And there's nothing in the record that
4 demonstrates that the trustees weren't aware of the
5 demographics of their plan. In fact to the contrary, the
6 record reflects that they knew all about their employees.

7 And when Dr. Pomerantz was asked that question in his
8 deposition, first of all, do you know who picked, he didn't
9 know who picked the allocation, and he didn't know whether it
10 was Wharton or whether or not it was -- whether it was the
11 trustees, and he didn't know what the trustees knew or didn't
12 know. So you're being asked to accept a methodology that's
13 never been used, that doesn't fit the facts because the
14 fact -- the whole basis for proposing this theory is that age
15 wasn't considered, when the record shows that it was the
16 trustees who decided and the trustees did know.

17 And the issue of age is something that was discussed
18 repeatedly in the minutes of the trustees. Why? Because age
19 is a consideration that deals with liquidity, do you have
20 enough money to pay out the money that needs to come out of
21 the Plan in the particular month. In fact plaintiffs like to
22 cite the *GIW* case. In *GIW* all of the plan's assets were
23 invested in long-term bonds, they couldn't be liquidated. And
24 what the Court found is you have to consider age with respect
25 to liquidity needs. This was something that the trustees

1 considered, it's in the minutes of the meeting on a regular
2 basis because it was they, they who decided on behalf of the
3 people they worked with what should be the allocation.

4 So his report is one, first of all, authored by
5 somebody who doesn't satisfy the qualifications. And for
6 qualifications, if you look at 404(a)(1)(B) of ERISA,
7 404(a)(1)(B) says that you're supposed to measure prudence,
8 which is a legal determination, not one that is made by the
9 expert, the measure of prudence is to look and see what
10 somebody in a like capacity, in that instance either making
11 the decision or advising about the decision, would use in the
12 conduct of an enterprise with like character and like aims.
13 And that's -- what's the enterprise? The enterprise is the
14 employee benefit plan that was not participant directed. And
15 we don't have that here. We have, if you will, we have
16 proposed an expert who actually doesn't satisfy the
17 qualifications level that's in 702 where you have to plug in
18 the statutory provision, which is 29 U.S.C. 1104(a)(1)(B).

19 THE COURT: Well, let's start with qualifications.
20 Pomerantz is not without qualifications, doesn't he have a
21 Ph.D. and pretty wide experience in the investment field
22 generally? He may not have managed an employee benefit fund,
23 but he's done a lot of things, hasn't he?

24 MR. LEVIN: But the fact that he knows how to invest
25 with respect to other plans, doesn't mean he has a clue what's

1 an appropriate method for advising this Plan. So the fact
2 that he has -- that he's a mathematician and he has a Ph.D. in
3 mathematics was support for Dr. Pomerantz to be able to
4 compare fees in other cases but not to present what an
5 allocation method is. He has no qualification for that,
6 there's none that's been presented. He wrote an article about
7 401(k) plans and doesn't mention the method that he's
8 proposing here.

9 So if the qualification -- the qualification isn't just
10 does he know a lot of stuff and does he have a degree and does
11 he have a Ph.D. or does he know mathematics. In fact the
12 subject matter on which he wrote his thesis about which he
13 testified, his thesis did not deal with this issue. And in
14 fact this issue can be related to that subject matter, but
15 he's never learned any of it. So the question you asked about
16 doesn't he have -- he doesn't have the knowledge, he doesn't
17 purport to have the skill, he certainly doesn't have the
18 experience, he has no training, and he has no education in any
19 of this.

20 So I'm not saying that he doesn't know mathematics,
21 what I'm saying is that in order to give an expert opinion on
22 this particular issue, the opinion of an expert, he has to be
23 qualified, and the qualification that he needs is one set out
24 in 29 U.S.C. 1104(a)(1)(B), which requires that it be someone
25 who's dealt with a like enterprise, that like enterprise is

1 this Plan. And realize his response to, well, you've never
2 done it for this kind of a Plan and plaintiffs' response is
3 that this kind of Plan, their words, extremely rare. I think
4 Pomerantz said that in his deposition and the plaintiffs said
5 it's unique, and there are over 171,000 plans of this sort.
6 As we pointed out in our papers, I mean, that's not what I
7 would call extremely rare or unique. He's just never seen
8 them before. He doesn't know about them.

9 And that's why I start out with the first line of 702,
10 is that it's supposed to be somebody who's qualified.
11 Because, if you will, your Honor, the expert is supposed to
12 help you, that's what experts are really supposed to do. I
13 know each side hires experts and whatnot, but in the end the
14 role of the expert is to help the Court. So you would turn to
15 this expert and say, well, in your experience of selecting
16 allocations for nonparticipant investment plans, what's your
17 experience, how is it done, how did you think about it,
18 when did you recommend it? They're all questions he would
19 have to answer you I don't know, I don't know, I don't know,
20 because he's not qualified in this particular area. And with
21 171,000 -- he even said that people who were familiar with it
22 would not color his opinion, he stated it in his deposition,
23 it's repeated again in the brief. And yet if you don't have
24 any experience, and the standard is one of someone in a like
25 capacity administering -- dealing with a like plan, wouldn't

1 you consider what the others did? And in this instance if you
2 looked and see, you'll see that nobody did what he says you
3 should do.

4 So when you asked is it plausible, I think the answer
5 is no, it's not plausible. And I submit to you that you don't
6 need to -- forgive me. The idea of having an expert come,
7 somebody who purports to be an a expert who couldn't answer
8 any of those questions to you, I don't think is helpful to you
9 and that's what 702 is all about.

10 THE COURT: Is his biggest shortcoming that he's
11 taking investment advice that's supplied to individuals, like
12 invest in accordance with your age, and he's applying it to a
13 group of almost 300 beneficiaries of all ages?

14 MR. LEVIN: The flaw in that -- I mean, that is his
15 theory and --

16 THE COURT: We know that Social Security gives this
17 sort of advice. And, according to the papers, TD AmeriTrade
18 would give this sort of advice about how an individual should
19 invest, and so he's borrowed that formula and he's applied it
20 here. Is that what make the methodologically unsound?

21 MR. LEVIN: What makes it methodologically unsound is
22 more than one. The first is the notion that he's advanced the
23 theory to calibrate by participant and then add it up and
24 divide, which, as you'll see, in ours -- we presented in our
25 papers the Department of Labor says that's not the way

1 fiduciaries of nonparticipant directed funds invest, it says
2 they look at the universe as a -- the participants as a whole.
3 And then in the preamble to the regulation, which we also
4 cited and quoted from, they explain -- the Department of Labor
5 explained what that meant, and it wasn't add up the separate
6 pieces and divide. There is a method of doing that but that
7 method is used for individual account plans where each
8 individual has his or her own separate investments.

9 But there's more in terms of the methodological issue.
10 If his concept even were one that were accepted, whatever it
11 is that forms the basis for his methodology, in applying it
12 you would do two things. One is you would, for the period,
13 even the limited period that he did it for, you would need to
14 change that method each year because the demographic changes,
15 people get older, they get more money, they have less money,
16 they withdraw money, so the demographic and the account
17 balances, all of which information was available and we've
18 provided so much demographic information. But he didn't do
19 that, he lockstep and his report is lockstep 56/44 for every
20 single year.

21 Not only that, the methodology that he used he then
22 applied for calculating damages. But we know that the
23 question of damages requires you to determine the date of the
24 breach and he didn't do that. In fact he said that he kept
25 that out because he knew that the Plan was -- the bad approach

1 that the trustees were using wasn't appropriate and they were
2 getting gains. So his methodology even for calculating
3 damages fails on the whole notion you offset gains against
4 losses.

5 So what you have here also is independently, since he
6 calls his method the most prudent method, I mean, his words,
7 recognizing that prudence is an issue of law but that's what
8 he called it, the most prudent method, one of the elements of
9 testing the satisfaction of the *Daubert* criteria is to see how
10 would you have applied -- how do you apply this method when
11 you're doing it outside of court. Well, he never used it
12 outside of court. And even in court he didn't go back and say
13 I wonder what, as long as Goldenberg was in the Plan from 1989
14 currently, what would this have done. That doesn't
15 demonstrate prudence, that's to say it's not hindsight, you
16 can't say, well, it was prudent because you made money or it
17 was imprudent because you lost money, that's not the test.
18 But wouldn't you have gone back to test your theory as far
19 back as you could to see what the impact would be on the
20 participants so you could know whether or not there really
21 were gains or losses, since his notion was that age wasn't
22 considered and he had before him evidence that demonstrated
23 that age was considered.

24 So I submit to you that's not what you call testing a
25 theory. The method has to be one that bears scrutiny by the

1 alleged expert himself. And his theories, both the
2 calculation of damage and the notion of how the investments
3 should have been allocated, don't comply with anybody's theory
4 but his own.

5 THE COURT: Was he ever able -- maybe it's a question
6 I'll save for the plaintiffs.

7 I have no other questions.

8 MR. LEVIN: Thank you.

9 MR. HINSON: Your Honor, may I be heard briefly on
10 this issue?

11 THE COURT: I'm afraid we're running out of time.

12 MR. HINSON: Thank you, your Honor.

13 THE COURT: I want to give Mr. Lakind some --

14 MR. A. LAKIND: Your Honor, I had a lengthy argument
15 prepared, but I'll just confine it to addressing the issues
16 raised on oral argument and rely on my brief with regard to
17 the balance.

18 With regard to Dr. Pomerantz's experience, he was head
19 of asset allocation for many years at a Wall Street firm,
20 Weiss, Peck & Greer. He was vice president for Morgan --

21 THE COURT: He has no experience with managing or
22 advising pension funds, does he?

23 MR. A. LAKIND: Yes.

24 THE COURT: Of this sort of nonparticipant directed
25 pension fund?

1 MR. A. LAKIND: Yes, he does, because pension funds
2 tend to be nonparticipant directed, you know, they invest
3 enough money and there's a defined benefit at the end and he's
4 advised pension funds, and he named the pension funds he
5 advised during the course of his deposition. He's been an
6 investment advisor for assets in ERISA plans. He's been a
7 consultant to companies on asset management. He's hired and
8 fired investment management. And he wrote or contributed to
9 investment policies for retirement plans.

10 Now, what makes this Plan unique, and to the extent
11 there's an argument this is a profit sharing plan, he has no
12 experience with a profit sharing plan, Mr. Hembrough explained
13 in his deposition what makes a profit sharing plan unique is
14 the source of the funding, nothing else. Nothing else.

15 Number three, there was an interesting comment made by
16 counsel that said the following: Age should be considered.

17 THE COURT: Well, what also makes this one unique is
18 that the employees don't get to choose where the investment
19 goes --

20 MR. A. LAKIND: Right.

21 THE COURT: -- unlike most plans.

22 MR. A. LAKIND: Right. Which makes it so difficult
23 and which requires a reconciliation of a broad set of
24 interests.

25 THE COURT: Does he have experience or book learning

1 on how to do that?

2 MR. A. LAKIND: Just in connection with defined
3 benefit plans, which are designed, obviously, you know, to
4 include certain benefit at the end, not with regard to plans
5 specifically like this. But I think *Holbrook* and many of our
6 cases deal with situations where, I think it was *Holbrook*, you
7 had a fellow that sold automative supplies, taught automotive
8 repair in a high school, and the Court held, well, he's
9 qualified to testify in a products liability case. If you
10 look at *Penata* and every other case we cite, I'm sure your
11 Honor has, they all have far less direct qualifications than
12 this. He has been involved in making asset allocations to
13 achieve goals and the context in which it's done is not
14 terribly relevant.

15 THE COURT: Well, is he able to point to this
16 methodology being used by any other fund of this type?

17 MR. A. LAKIND: He could not, but here's why. Two
18 reasons. Number one is one of the cases we cite talks about
19 the difficulty in economic cases of finding identical examples
20 or similar examples because everything is so unique. But one
21 of the things counsel said to the Court was age is important
22 because it's an indicator of liquidity. And if I might just
23 go through perhaps the following hypothetical to tell why
24 Dr. Pomerantz derived this methodology because he had to
25 consider liquidity, the case law says he did.

1 If we have a situation where you have ten 24 year olds
2 that each have \$1,000 and then you have one 60 year old with
3 \$150,000 and you do not consider account balances in doing an
4 asset allocation, that asset allocation will be skewed so much
5 more towards the younger people with smaller investments that
6 the plan could not achieve its desire to protect capital or
7 liquidity because the money being invested is the money of
8 people that have more money in the plan, the older people. So
9 if the goal is to conserve assets, the question is whose
10 assets are you conserving, and they need to consider where
11 those assets are and what the age is. If you simply average
12 age or simply focus on the fact that you have ten people who
13 are young and have \$1,000, it would be impossible for FSC to
14 achieve its goal of protecting liquidity and conserving
15 assets.

16 And the issue, once again, is not is Dr. Pomerantz
17 right or is he wrong, it's not the quality of whether --

18 THE COURT: Not whether it's reliable, whether this
19 is a testable theory outside of the litigation context. And
20 often we can find the answer in something that's been
21 published or in the experience of what's actually being done
22 in the market. And other than his saying this is done for
23 individuals and so I'm just going to apply that thinking to a
24 group, I don't see any basis for it. Is there one? Has he
25 ever applied this himself?

1 MR. A. LAKIND: He has not.

2 THE COURT: And does it come from any book or any
3 other experience that he's familiar with?

4 MR. A. LAKIND: Well, the 100 minus age, I think
5 that's fairly common. I think your Honor is more interested
6 in the age weight.

7 THE COURT: No, I'm not interested in the 100 minus
8 age because at least, according to the papers, the examples
9 that are given are for individuals.

10 MR. A. LAKIND: Yes, the 100 minus age is a metric
11 used for individuals. Because this Plan is unique, because
12 you have a collection of individuals that have no control over
13 their investment policies essentially, the question becomes
14 what is the methodology to employ if you have to consider age
15 because all the case law says you have to consider age, what
16 is the methodology to employ to consider age. And
17 Dr. Pomerantz said you can't simply average age because that
18 will not take account of liquidity. What he does is he uses
19 the weighted average of age times the account balance. While
20 there are not comparable studies of people who have done that,
21 that is certainly a plausible methodology to achieve the
22 liquidity and conserve assets.

23 THE COURT: Well, it is if it's admissible, but it's
24 only admissible if it's reliable, if it's a reliable
25 methodology. He could spin out something that looks nice and

1 produces damages, but it does have to have its footing in the
2 way that actual fiduciaries are meeting these responsibilities
3 in the real world, doesn't it?

4 MR. A. LAKIND: I think the only thing that needs to
5 have a footing in that is the liability issue, which is is age
6 a relevant criteria, because there we have to show a plausible
7 claim. With regard to damages, the goal is not the quality of
8 the model under the *Sullivan* case, it's whether or not the
9 model has a classwide impact. And *Sullivan* makes it clear
10 that at this stage of the litigation a court is not to
11 consider whether the model is reasonable, speculative or
12 inferential, it's simply whether or not the model can be
13 applied on a classwide basis, and you have not heard a thing
14 from defendants to suggest that it can. Insofar as we say it
15 can be applied on a classwide basis, that's testable, they can
16 determine, just as they -- in fact it was tested when they
17 returned the prohibitive transaction claims. They could
18 determine if there's error rates, measurable error rates by
19 just replicating what we can do. The use of a weighted
20 average is certainly a standard, it's a generally accepted
21 standard and it's recognized as a reliable measure.

22 So with regard to the issue before the Court once again
23 is not whether or not on the damage model this in fact is
24 reasonable, improper, or the best, it's whether or not this
25 damage model can be applied on a classwide basis and there's

1 no suggestion that it cannot.

2 THE COURT: Okay.

3 MR. A. LAKIND: Your Honor, I'll rely on my brief, I
4 realize it's late and I appreciate all the time your Honor has
5 extended to us.

6 THE COURT: Thank you very much.

7 MR. A. LAKIND: Thank you, your Honor.

8 THE COURT: As to the other motion pertaining to
9 precluding Lucy Allen, I'll handle that based on the papers
10 and reserve decision.

11 And so I've reserved decision with regard to four
12 motions in all, Docket Item 160, which is class certification,
13 Docket Item 182, which is the motion for partial summary
14 judgments on Counts One and 27.

15 MR. A. LAKIND: 26, I believe.

16 THE COURT: 26. And the *Daubert* motions at Dockets
17 183 and 185.

18 If I have any other questions, I'll write to counsel, I
19 don't think that I do, and you should expect an Opinion by the
20 end of that the month.

21 Thank you, everybody. Good night.

22 (Proceedings Concluded)

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C E R T I F I C A T E

I, LISA MARCUS, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes to the best of my ability of the matter hereinbefore set forth.

S/Lisa Marcus, CSR
LISA MARCUS
Official U. S. Reporter
N.J. Certificate No. XI01492

DATE: September 10, 2012

#	90:4	121:16
#001 [1] - 1:6	1957 [2] - 90:8, 90:17 1976 [6] - 82:7, 84:16, 90:16, 90:20, 92:13, 92:14 1989 [2] - 54:17, 114:13 1990's [1] - 103:23 1st [2] - 37:14, 37:18	27 [2] - 87:16, 121:14 29 [2] - 109:18, 110:24
\$		3
\$1,000 [2] - 118:2, 118:13 \$150,000 [1] - 118:3 \$50 [1] - 100:8	2	3 [5] - 19:3, 31:22, 72:13, 72:14, 72:17 30 [4] - 53:23, 72:14, 72:17, 73:5 30(b)(6) [1] - 9:6 300 [2] - 2:13, 112:13 30309-3424 [1] - 2:9 31 [3] - 36:6, 39:15, 68:25 32 [1] - 8:23 347 [2] - 42:3, 53:17 38 [4] - 41:24, 42:1, 47:23, 71:2
'	2 [1] - 102:17 20 [7] - 30:15, 33:11, 33:12, 41:23, 60:15, 68:1, 68:8 20/15 [1] - 40:7 20/20 [1] - 40:7 200 [1] - 2:4 2000's [1] - 54:9 2002 [7] - 11:11, 82:11, 90:12, 90:18, 92:11, 93:24, 94:1 2005 [5] - 85:5, 86:18, 93:23, 93:24, 107:24 2006 [17] - 33:10, 35:4, 37:5, 37:19, 37:24, 42:3, 42:19, 42:24, 43:5, 43:7, 53:16, 68:7, 69:1, 70:20, 70:21, 71:16, 76:2 2007 [6] - 9:25, 33:10, 35:3, 36:6, 39:15, 76:2 2008 [11] - 8:25, 34:22, 37:7, 42:15, 42:19, 42:23, 42:24, 61:14, 69:22, 71:16, 78:13 2009 [27] - 8:24, 9:1, 11:13, 11:17, 27:8, 34:3, 35:8, 35:20, 57:6, 61:14, 63:7, 67:25, 68:2, 68:6, 68:7, 70:21, 71:9, 71:10, 71:14, 71:16, 82:23, 88:2, 89:17, 89:20, 93:18, 98:1, 102:13 2010 [3] - 42:4, 42:5, 70:21 2011 [2] - 27:6, 69:2 2012 [3] - 1:17, 103:13, 122:17 2020 [1] - 10:13 21 [1] - 2:8 22 [1] - 61:1 23 [4] - 6:16, 8:12, 12:10, 67:22 23(a)(2) [2] - 25:8, 26:13 23(a)(3) [1] - 25:10 23(a)(4) [1] - 26:23 23(b) [6] - 5:2, 14:24, 14:25, 16:9, 28:7, 77:23 23(b)(1) [6] - 15:16, 22:5, 23:9, 23:15, 23:18, 78:1 23(b)(1) [1] - 24:8 23(b)(2) [1] - 23:23 23(b)(3) [6] - 15:17, 22:5, 22:13, 22:18, 23:18, 24:10 23(b)(3) [1] - 23:7 24 [1] - 118:1 241 [3] - 8:23, 8:24, 57:6 250 [5] - 53:16, 56:18, 56:19, 100:7, 101:19 26 [5] - 80:17, 86:9, 98:11, 121:15,	4
0	0 [3] - 59:25, 60:15, 105:14 08101 [1] - 1:16 08542-0627 [1] - 2:14 08648 [1] - 2:5 09-5202 [2] - 1:9, 3:4	4 [1] - 83:13 4.34 [1] - 92:17 4.7 [4] - 69:3, 70:22, 70:23, 71:5 40 [4] - 19:4, 42:6, 44:22, 57:22 401 [1] - 43:19 401(k) [4] - 53:9, 92:3, 101:17, 110:7 402(b) [1] - 83:7 404 [2] - 5:10, 85:3 404(a)(1)(B) [3] - 32:23, 109:6, 109:7 404(a)(1)(D) [2] - 91:19, 91:22 44 [3] - 11:9, 41:25, 106:7 44/56 [11] - 11:16, 36:19, 40:11, 47:22, 47:25, 65:8, 65:20, 70:16, 73:20, 74:5 46 [1] - 8:21 4TH [1] - 1:15
1	1 [3] - 37:5, 37:7, 37:24 10 [4] - 50:14, 64:22, 83:12, 122:17 100 [9] - 36:9, 44:14, 60:1, 60:15, 106:8, 106:21, 119:4, 119:7, 119:10 101 [1] - 2:4 105 [1] - 2:13 11 [1] - 35:20 1104(a)(1)(B) [1] - 110:24 1104(a)(1)(B) [1] - 109:18 113 [1] - 57:8 12 [2] - 8:24 1201 [1] - 2:8 128 [1] - 57:7 14 [1] - 1:17 1492 [1] - 1:25 15 [8] - 40:14, 40:17, 52:7, 54:7, 54:20, 58:14, 62:19, 99:19 160 [1] - 121:12 17 [1] - 99:19 171,000 [4] - 46:10, 46:14, 111:5, 111:21 18 [1] - 55:22 182 [1] - 121:13 183 [1] - 121:17 185 [1] - 121:17 189 [1] - 99:18 19 [1] - 103:7 1956 [5] - 81:17, 81:20, 82:1, 84:13,	5
		5 [2] - 59:8, 83:13 5.2 [3] - 83:20, 84:23, 93:2 5.2(a) [1] - 90:25 50 [12] - 11:11, 34:5, 41:25, 54:17, 57:6, 57:7, 57:8, 67:18, 93:14, 102:13, 102:14 50/50 [9] - 11:12, 11:15, 11:16, 20:23, 35:21, 68:12, 102:14, 102:18 500 [2] - 33:20, 49:23 502 [1] - 12:12 502(h) [1] - 77:25 55 [5] - 52:1, 54:5, 54:8, 54:21, 55:2 5500 [1] - 10:14 56 [11] - 8:24, 9:1, 11:9, 36:8, 39:5, 39:16, 40:13, 47:20, 47:21, 56:16, 106:7 56(d) [4] - 96:1, 96:8, 96:10, 96:14 56/44 [3] - 73:25, 76:23, 113:19 589 [1] - 77:24 59 [1] - 42:1

6	accept [4] - 36:23, 70:14, 74:21, 108:12 acceptable [1] - 98:9 accepted [2] - 113:10, 120:20 accompanied [1] - 96:10 accomplished [2] - 9:13, 21:25 accordance [6] - 5:16, 37:1, 80:20, 80:23, 91:20, 112:12 according [5] - 47:24, 60:17, 71:2, 112:17, 119:8 account [35] - 21:12, 31:8, 41:16, 41:17, 47:9, 50:14, 52:13, 52:22, 54:7, 54:21, 55:15, 56:15, 57:5, 57:20, 64:21, 66:1, 70:12, 71:1, 72:1, 82:16, 82:18, 82:20, 83:18, 83:20, 84:5, 84:20, 84:21, 91:13, 113:7, 113:16, 118:3, 119:18, 119:19 accounts [13] - 41:11, 41:20, 41:23, 42:5, 43:20, 54:6, 55:12, 55:18, 56:11, 59:18, 93:3, 93:6 accurate [3] - 9:3, 18:8, 122:12 achieve [6] - 24:6, 42:11, 117:13, 118:6, 118:14, 119:21 acknowledge [1] - 37:25 acknowledged [4] - 9:14, 10:18, 68:17, 80:2 acknowledges [1] - 68:25 ACP [1] - 2:8	adequate [9] - 7:12, 14:17, 64:5, 65:10, 66:13, 66:19, 67:9, 77:12, 102:5 adhere [1] - 22:15 adjust [1] - 60:1 adjusted [1] - 73:18 administer [1] - 5:16 administering [4] - 23:19, 83:10, 106:22, 111:25 admissibility [1] - 8:7 admissible [2] - 119:23, 119:24 admitted [2] - 35:25, 59:13 adopt [3] - 80:20, 91:13, 103:11 adopted [10] - 11:14, 21:5, 37:2, 54:9, 85:5, 87:5, 90:15, 90:19, 92:13, 93:22 adopting [2] - 48:8, 89:13 adoption [1] - 92:21 advance [4] - 13:11, 13:25, 95:21, 100:1 advanced [6] - 8:10, 105:8, 105:11, 105:17, 107:3, 112:22 advancing [2] - 21:16, 22:21 advantage [7] - 14:19, 31:24, 49:20, 53:5, 53:7, 62:19, 78:17 adversary [1] - 79:7 adverse [2] - 87:21, 104:3 advertisement [1] - 100:7 advice [6] - 10:11, 59:4, 62:16, 112:11, 112:17, 112:18 advised [3] - 62:9, 116:4, 116:5 advises [1] - 12:11 advising [3] - 109:11, 110:1, 115:22 advisor [7] - 10:14, 36:3, 85:7, 86:18, 102:6, 107:24, 116:6 advisor/representative [1] - 93:13 advisors [3] - 3:19, 60:19, 62:1 advocating [1] - 76:25 affect [1] - 46:7 affidavit [5] - 63:13, 66:16, 96:10, 96:17 afford [1] - 46:3 affords [1] - 58:13 afraid [1] - 115:11 afternoon [9] - 3:2, 3:11, 3:13, 3:16, 4:3, 24:18, 51:11, 51:12, 51:13 age [107] - 7:20, 7:21, 8:13, 8:16, 8:19, 8:21, 9:1, 9:3, 9:4, 9:8, 9:13, 9:14, 9:17, 9:19, 9:22, 10:3, 10:6, 12:20, 19:4, 30:19, 36:5, 36:8, 36:9, 39:16, 39:21, 41:23, 50:4, 51:2, 51:3, 51:4, 53:23, 54:5, 54:8, 54:12, 54:17, 54:19, 54:21, 55:2, 55:14, 55:24, 55:25, 56:7, 56:25, 57:5, 57:13, 57:20, 58:4, 62:8, 64:24, 65:20, 70:13, 70:25, 71:6, 72:1, 72:14, 72:17, 73:25, 75:5, 75:11, 75:14, 75:15, 75:17, 75:18, 75:25, 78:10, 78:14, 78:17, 78:19, 79:11, 79:14, 79:17, 79:23, 80:2, 80:3, 94:11, 94:12, 95:16, 106:7, 106:13, 106:20, 108:14, 108:17, 108:18, 108:24, 112:12, 114:21, 114:23, 116:16, 117:21, 118:11, 118:12, 119:4, 119:6, 119:8, 119:10, 119:14, 119:15,
7		
<p>7 [1] - 68:7 70 [1] - 105:15 70/30 [3] - 34:17, 107:25, 108:2 702 [4] - 105:20, 109:17, 111:9, 112:9 71 [2] - 54:20, 62:8 73 [2] - 47:21, 87:15 73/27 [1] - 87:15 75 [1] - 8:20</p>		
8		
<p>8 [3] - 11:13, 68:7, 90:3 8.1 [1] - 90:24 8.2 [1] - 83:10 8.9 [1] - 85:19 80 [6] - 30:15, 33:11, 33:12, 53:23, 60:16, 68:9 80/20 [17] - 19:14, 20:23, 32:6, 32:10, 35:23, 49:16, 54:13, 68:3, 69:23, 72:5, 73:17, 78:19, 92:18, 102:12, 106:15, 108:2, 108:3 856 [1] - 1:16</p>	<p>acquisition [1] - 9:20 act [3] - 19:17, 32:23, 66:23 acting [1] - 32:25 action [18] - 13:24, 16:16, 18:11, 18:17, 18:20, 23:11, 25:22, 27:19, 30:8, 36:15, 43:23, 46:7, 47:9, 48:11, 69:7, 79:2, 82:11 ACTION [1] - 1:8 actions [10] - 15:2, 15:3, 15:5, 15:25, 25:11, 25:24, 36:14, 36:16, 36:17, 70:6 active [7] - 32:13, 32:14, 33:8, 33:16, 35:2, 35:16, 36:24 actual [10] - 23:25, 31:4, 31:6, 33:23, 41:22, 42:6, 60:17, 87:4, 106:17, 120:2 add [6] - 17:5, 41:13, 76:5, 80:21, 112:23, 113:5 added [1] - 93:16 adding [1] - 107:11 addition [5] - 26:21, 27:7, 69:19, 85:12, 87:6 additional [2] - 102:23, 104:11 additionally [7] - 90:21, 92:20, 93:21, 100:2, 101:2, 101:24, 102:9 address [11] - 4:22, 6:24, 25:8, 25:12, 28:13, 51:9, 74:20, 89:11, 91:9, 97:18, 99:11 addressed [4] - 8:5, 8:9, 21:16, 67:21 addressing [3] - 8:11, 47:3, 115:15 adducing [1] - 96:11 adequacy [9] - 12:18, 13:3, 13:10, 25:11, 25:14, 26:22, 62:6, 63:24, 76:4</p>	
9		
968-4986 [1] - 1:16		
A		
<p>a)(4) [2] - 25:10 a/k/a [1] - 1:10 abandoning [1] - 25:17 ability [8] - 11:7, 15:21, 52:19, 61:16, 63:11, 75:3, 93:13, 122:13 able [5] - 41:3, 61:11, 110:3, 115:5, 117:15 absence [5] - 5:17, 12:17, 81:11, 94:23, 103:6 absent [2] - 26:8, 63:25 absentee [1] - 27:2 absolute [1] - 71:16 absolutely [5] - 28:3, 64:8, 71:7, 83:1</p>		

<p>119:16, 119:17, 119:19, 120:5 ages [2] - 72:12, 112:13 aggregate [1] - 55:19 aggressive [9] - 11:18, 18:6, 18:7, 19:1, 64:25, 71:11, 72:25, 73:1, 73:3 aging [4] - 56:25, 57:11, 75:9, 75:19 ago [2] - 29:15, 42:20 agree [4] - 8:1, 27:25, 57:13, 59:22 agreed [1] - 55:21 agreement [2] - 5:18, 7:9 Agreement [77] - 12:17, 12:18, 80:20, 81:10, 81:11, 81:15, 81:16, 81:18, 81:19, 81:22, 82:1, 82:2, 82:8, 82:9, 82:13, 82:15, 82:25, 83:2, 83:6, 83:16, 83:19, 83:23, 84:1, 84:4, 84:7, 84:9, 84:12, 84:13, 84:24, 85:16, 85:24, 86:3, 86:5, 89:13, 89:16, 89:19, 89:22, 89:23, 89:24, 90:2, 90:25, 91:2, 91:5, 91:6, 91:8, 91:11, 91:12, 91:14, 91:17, 91:19, 91:22, 91:23, 91:24, 92:8, 92:9, 92:21, 93:3, 93:9, 93:10, 93:23, 93:25, 94:5, 94:10, 94:12, 94:23, 95:6, 95:8, 95:14, 95:15, 96:22, 98:1, 98:3, 98:4, 103:7, 103:11 ahead [1] - 28:13 AIG [2] - 24:23, 24:24 aim [1] - 62:22 aims [5] - 32:22, 33:2, 47:17, 47:18, 109:12 air [1] - 36:9 Airlines [1] - 94:9 akin [1] - 87:3 al [3] - 1:11, 3:3, 3:4 allegation [7] - 7:11, 17:25, 56:2, 61:17, 61:18, 104:14 allegations [2] - 27:13, 48:22 allege [3] - 8:13, 9:2, 55:23 alleged [10] - 5:15, 7:8, 10:5, 42:22, 43:5, 43:6, 48:14, 51:5, 65:7, 115:1 alleges [1] - 98:12 alleging [1] - 5:10 Allen [12] - 9:14, 21:8, 31:5, 41:21, 43:10, 68:14, 68:17, 68:25, 74:24, 80:1, 104:21, 121:9 Allen's [3] - 41:10, 53:22, 70:20 allocate [3] - 11:7, 21:22, 76:12 allocated [11] - 12:25, 21:10, 21:12, 21:24, 41:17, 47:13, 70:4, 71:6, 71:17, 73:24, 115:3 allocating [3] - 61:23, 69:25, 83:9 allocation [82] - 8:14, 9:7, 10:11, 10:21, 12:3, 12:7, 12:20, 15:4, 16:6, 18:7, 18:13, 18:19, 19:2, 19:5, 19:6, 19:7, 19:10, 21:5, 32:7, 32:11, 33:19, 36:10, 37:9, 40:1, 40:5, 40:9, 43:14, 45:2, 46:12, 47:24, 48:2, 51:2, 54:13, 63:23, 64:23, 65:1, 65:8, 65:20, 67:19, 68:2, 68:4, 68:8, 68:11, 69:23, 70:9, 70:10, 71:7, 71:11, 71:24, 71:25, 72:25, 73:2, 73:3, 73:12, 73:23, 74:2, 74:9, 78:11,</p>	<p>78:15, 78:21, 79:14, 85:10, 87:2, 87:12, 87:15, 92:18, 102:13, 102:14, 102:18, 106:14, 107:22, 107:25, 108:9, 109:3, 110:5, 115:19, 118:4 Allocation [1] - 5:12 allocations [11] - 15:6, 18:24, 31:5, 32:20, 33:23, 87:4, 87:5, 102:7, 111:16, 117:12 allow [1] - 54:10 allowed [4] - 20:15, 66:2, 82:16, 92:1 allowing [1] - 99:6 allows [3] - 9:22, 20:13, 107:13 alluded [1] - 62:18 almost [5] - 16:14, 30:12, 42:12, 43:14, 112:13 Alston [2] - 3:17, 3:21 ALSTON [1] - 2:6 alternative [5] - 5:22, 6:8, 22:15, 22:21, 31:7 altogether [1] - 63:22 amend [4] - 17:5, 55:6, 55:8 amended [5] - 80:16, 84:16, 102:16, 105:10 amending [2] - 83:11, 92:12 amendment [4] - 54:9, 82:7, 90:14, 90:19 amendments [2] - 20:18, 69:16 American [1] - 94:8 AmeriTrade [1] - 112:17 amicably [1] - 18:21 amount [6] - 29:5, 34:10, 70:4, 70:12, 71:6, 71:18 amounts [1] - 42:8 analysis [11] - 11:3, 25:9, 31:6, 35:6, 41:20, 43:19, 43:22, 61:21, 63:12, 67:23, 99:6 analyze [1] - 41:11 analyzed [1] - 6:18 AND [6] - 1:15, 2:3, 2:7, 2:11, 2:12, 2:14 ANDREW [1] - 1:4 annually [2] - 92:22, 99:11 annuity [2] - 59:6, 63:15 answer [14] - 43:12, 59:19, 60:10, 72:12, 72:19, 73:17, 75:22, 77:23, 79:8, 81:13, 111:19, 112:4, 112:7, 118:20 answered [2] - 67:13, 82:23 answering [1] - 21:19 answers [6] - 26:20, 38:18, 38:22, 43:17, 51:1, 81:13 anticipate [1] - 33:19 antithetical [1] - 49:13 apologize [2] - 89:16, 94:17 Appeals [1] - 6:13 appearances [1] - 3:8 application [8] - 5:2, 12:10, 17:9, 18:9, 20:8, 20:10, 39:6, 96:1 applied [12] - 11:24, 12:8, 21:1, 42:7, 106:8, 112:19, 113:22, 114:10, 118:25, 120:13, 120:15, 120:25</p>	<p>apply [3] - 39:16, 114:10, 118:23 applying [2] - 112:12, 113:11 appreciate [4] - 20:5, 24:20, 80:12, 121:4 appreciated [1] - 74:10 appreciation [5] - 53:8, 54:18, 63:5, 68:1, 68:5 approach [13] - 20:24, 20:25, 36:9, 40:9, 40:11, 41:5, 41:8, 42:7, 43:14, 67:24, 73:23, 113:25 approached [2] - 48:12, 54:12 approaches [1] - 31:7 appropriate [23] - 8:6, 12:13, 14:2, 15:7, 15:9, 18:18, 20:22, 26:3, 28:18, 36:15, 37:13, 47:5, 47:9, 56:13, 60:21, 62:2, 68:11, 77:23, 78:1, 86:11, 105:12, 110:1, 114:1 appropriately [1] - 47:13 appropriateness [1] - 19:10 April [1] - 90:15 apt [1] - 26:20 arbitrary [1] - 49:7 area [2] - 14:11, 111:20 argue [1] - 24:19 argued [1] - 4:14 arguing [2] - 41:1 argument [28] - 3:4, 4:15, 5:3, 13:25, 18:2, 21:16, 22:3, 26:11, 27:20, 27:22, 45:24, 67:21, 71:9, 72:19, 78:6, 91:16, 94:25, 95:22, 97:16, 97:18, 103:6, 103:8, 103:13, 103:16, 103:17, 115:14, 115:16, 116:11 arguments [9] - 8:10, 13:11, 22:21, 25:17, 80:12, 84:11, 91:9, 104:24 arise [1] - 16:25 arises [2] - 38:12, 39:2 Arnold [1] - 3:11 ARNOLD [1] - 2:3 article [2] - 81:23, 110:6 Article [1] - 83:11 Articles [1] - 83:13 articulates [1] - 79:17 aside [1] - 66:13 aspect [1] - 7:8 assembled [1] - 83:4 assert [1] - 13:12 asserted [1] - 55:11 asserting [1] - 56:6 assertion [2] - 79:15, 103:5 assessment [1] - 6:19 asset [37] - 8:14, 9:7, 10:21, 12:20, 16:6, 18:13, 18:19, 18:23, 19:4, 19:10, 21:4, 31:4, 32:11, 33:19, 36:7, 36:10, 39:25, 40:9, 43:13, 45:2, 46:12, 48:2, 64:23, 68:2, 68:11, 69:23, 70:23, 70:24, 71:24, 71:25, 85:10, 102:12, 115:19, 116:7, 117:12, 118:4 assets [39] - 9:20, 40:1, 41:2, 44:6, 52:15, 52:21, 52:24, 53:1, 53:8, 53:19, 54:2, 54:18, 55:13, 55:14, 55:19,</p>
--	---	--

<p>55:20, 56:9, 56:21, 58:9, 58:10, 58:14, 58:15, 59:6, 60:13, 60:16, 62:14, 64:3, 72:13, 75:1, 87:16, 98:17, 99:3, 108:22, 116:6, 118:9, 118:10, 118:11, 118:15, 119:22</p> <p>associated [2] - 12:6, 31:25</p> <p>assume [1] - 31:10</p> <p>assuming [3] - 24:5, 37:14, 66:20</p> <p>assumption [1] - 18:25</p> <p>Atlanta [1] - 2:9</p> <p>attached [6] - 81:21, 84:14, 89:22, 91:4, 98:23, 99:18</p> <p>attacks [1] - 67:10</p> <p>attended [1] - 13:21</p> <p>attention [4] - 31:22, 32:14, 35:16, 43:17</p> <p>attorney [1] - 13:15</p> <p>attorneys [2] - 63:14, 86:14</p> <p>ATTORNEYS [3] - 2:5, 2:9, 2:14</p> <p>attributable [2] - 19:20, 69:15</p> <p>AUGUST [1] - 1:17</p> <p>August [4] - 35:4, 82:23, 89:17, 97:25</p> <p>authored [2] - 89:5, 109:4</p> <p>authority [2] - 78:19, 85:17</p> <p>authorized [2] - 52:11, 85:19</p> <p>automotive [1] - 117:7</p> <p>automotive [1] - 117:7</p> <p>available [2] - 70:11, 113:17</p> <p>avatar [1] - 56:20</p> <p>avenue [1] - 24:2</p> <p>average [14] - 8:21, 36:8, 39:15, 39:21, 50:7, 56:25, 64:11, 64:12, 75:15, 75:18, 118:11, 119:17, 119:19, 120:20</p> <p>averaged [1] - 56:20</p> <p>avoid [4] - 9:12, 21:3, 21:5, 63:21</p> <p>award [2] - 22:1, 68:16</p> <p>awarded [1] - 11:21</p> <p>aware [2] - 16:1, 108:4</p> <p>awfully [1] - 68:21</p>	<p>Barndt [2] - 4:7, 81:21</p> <p>Barndt's [1] - 84:14</p> <p>base [1] - 42:15</p> <p>based [13] - 9:7, 18:25, 33:4, 35:5, 47:16, 48:3, 51:2, 56:7, 61:21, 72:13, 97:12, 106:20, 121:9</p> <p>basic [2] - 48:1, 64:13</p> <p>basis [29] - 6:25, 11:8, 11:24, 12:8, 21:1, 21:23, 40:19, 43:15, 45:2, 46:8, 47:12, 49:14, 53:3, 65:25, 68:22, 72:8, 79:13, 83:12, 106:10, 107:3, 107:17, 107:19, 108:14, 109:2, 113:11, 118:24, 120:13, 120:15, 120:25</p> <p>Bates [1] - 32:4</p> <p>bear [2] - 5:7, 29:23</p> <p>bearing [1] - 97:12</p> <p>bears [2] - 31:14, 114:25</p> <p>beat [1] - 40:8</p> <p>become [2] - 19:8, 70:23</p> <p>becomes [2] - 20:22, 119:13</p> <p>befall [1] - 86:1</p> <p>beforehand [1] - 88:3</p> <p>began [1] - 54:16</p> <p>begin [3] - 39:10, 67:20, 74:11</p> <p>beginning [4] - 3:9, 34:22, 52:3, 52:8</p> <p>begun [1] - 16:1</p> <p>behalf [13] - 1:5, 3:14, 3:22, 3:24, 4:8, 18:11, 24:21, 25:25, 76:11, 89:10, 103:24, 109:2</p> <p>Behrend [7] - 6:13, 7:1, 8:2, 10:25, 11:5, 17:8, 21:18</p> <p>belong [1] - 70:7</p> <p>belongs [3] - 12:24, 15:23, 70:8</p> <p>below [2] - 72:12, 102:8</p> <p>bench [1] - 16:15</p> <p>beneficiaries [5] - 15:14, 39:21, 55:1, 64:1, 112:13</p> <p>benefit [24] - 15:24, 18:19, 20:4, 28:10, 30:3, 44:15, 45:7, 49:7, 49:10, 50:6, 50:21, 52:4, 53:19, 54:2, 56:10, 61:7, 62:15, 63:5, 88:17, 109:14, 109:22, 116:3, 117:3, 117:4</p> <p>benefited [6] - 28:15, 43:21, 51:5, 70:16, 70:19, 71:21</p> <p>benefiting [2] - 45:3, 48:17</p> <p>benefits [7] - 37:8, 42:21, 45:14, 46:25, 47:12, 53:2, 53:13</p> <p>best [9] - 14:15, 21:21, 24:6, 48:5, 64:9, 67:8, 78:15, 120:24, 122:13</p> <p>better [16] - 4:11, 21:4, 40:6, 41:24, 42:1, 42:6, 44:22, 45:16, 49:21, 49:23, 60:24, 61:19, 72:9, 74:13</p> <p>between [14] - 26:24, 31:16, 32:18, 33:15, 41:6, 59:25, 63:14, 69:2, 70:19, 70:21, 71:15, 79:6, 79:10, 103:10</p> <p>beyond [4] - 8:8, 13:6, 40:17, 100:9</p> <p>BIDDLE [1] - 2:10</p> <p>Biddle [3] - 3:24, 4:5, 4:8</p> <p>Bierwirth [1] - 5:21</p> <p>big [1] - 35:5</p>	<p>biggest [1] - 112:10</p> <p>bill [1] - 44:1</p> <p>binder [1] - 87:8</p> <p>Bird [2] - 3:17, 3:22</p> <p>BIRD [1] - 2:6</p> <p>bit [8] - 11:17, 41:3, 44:23, 54:24, 65:5, 69:5, 73:13, 80:14</p> <p>BLADER [1] - 2:2</p> <p>blue [1] - 33:13</p> <p>BLUMSTEIN [1] - 2:2</p> <p>board [3] - 34:14, 37:5, 46:16</p> <p>Boeing [2] - 27:6, 38:20</p> <p>Bogosian [2] - 9:9, 79:15</p> <p>bond [1] - 63:20</p> <p>bonds [6] - 10:19, 52:15, 74:11, 74:13, 93:15, 108:23</p> <p>book [2] - 116:25, 119:2</p> <p>BORIS [1] - 1:3</p> <p>borrowed [1] - 112:19</p> <p>bottom [1] - 62:20</p> <p>bottomed [1] - 35:9</p> <p>bounce [1] - 62:14</p> <p>bound [2] - 23:24, 27:2</p> <p>breach [11] - 36:20, 42:21, 42:22, 46:14, 48:15, 48:19, 49:18, 51:5, 56:1, 60:4, 113:24</p> <p>breached [2] - 89:12, 98:12</p> <p>brief [18] - 8:9, 9:24, 11:13, 13:5, 13:8, 18:5, 30:20, 76:9, 76:14, 93:12, 95:19, 96:5, 103:7, 107:1, 111:23, 115:16, 121:3</p> <p>briefed [2] - 76:8, 77:11</p> <p>briefing [1] - 96:4</p> <p>briefly [7] - 5:5, 59:11, 60:12, 64:19, 91:9, 115:9</p> <p>briefs [5] - 8:5, 8:23, 25:18, 104:24, 105:2</p> <p>bring [5] - 23:11, 29:24, 74:14, 76:17, 77:4</p> <p>broad [2] - 77:11, 116:23</p> <p>broader [1] - 74:24</p> <p>brokerage [1] - 68:19</p> <p>brought [4] - 5:6, 15:3, 15:5, 18:11</p> <p>burden [12] - 5:14, 5:19, 5:20, 6:1, 6:9, 8:2, 10:23, 10:24, 11:2, 22:1, 29:23, 79:1</p> <p>burdens [2] - 5:24, 6:7</p> <p>business [5] - 29:17, 51:23, 57:19, 57:23, 65:6</p> <p>Business [25] - 25:3, 30:18, 31:3, 33:15, 34:16, 86:23, 87:18, 87:23, 88:1, 88:6, 91:11, 92:7, 92:8, 92:25, 93:5, 93:9, 93:22, 94:3, 99:1, 99:2, 100:23, 102:5, 102:16, 104:6, 104:12</p> <p>buy [2] - 48:14, 48:15</p> <p>BY [3] - 2:3, 2:7, 2:11</p>
B		
<p>b)(1) [3] - 26:3, 26:6, 26:8</p> <p>b)(1) [1] - 23:22</p> <p>b)(3) [4] - 23:21, 26:3, 26:6, 26:10</p> <p>B.J [3] - 3:18, 9:6, 99:24</p> <p>background [4] - 12:9, 51:15, 56:12, 101:5</p> <p>backgrounds [1] - 104:7</p> <p>backward [1] - 78:7</p> <p>backwards [1] - 49:25</p> <p>bad [2] - 16:23, 113:25</p> <p>balance [3] - 71:1, 115:17, 119:19</p> <p>balanced [1] - 9:25</p> <p>balances [4] - 21:12, 57:5, 113:17, 118:3</p> <p>Bank [2] - 52:14, 82:17</p> <p>bank [5] - 83:18, 84:5, 84:19, 84:21</p> <p>BARNDT [2] - 2:13, 4:7</p>		

C		
<p>C.S.R [1] - 1:24 calculating [2] - 113:22, 114:2 calculation [4] - 36:5, 43:4, 47:20, 115:2 calculations [1] - 11:23 calibrate [1] - 112:23 CAMDEN [1] - 1:16 candidates [2] - 86:19, 87:1 cannot [13] - 9:13, 21:11, 33:4, 38:17, 45:8, 49:18, 56:17, 61:9, 74:15, 85:11, 92:3, 103:10, 121:1 capabilities [1] - 103:19 capable [1] - 26:16 capacity [4] - 26:19, 33:1, 109:10, 111:25 capital [5] - 69:21, 78:16, 79:17, 79:18, 118:6 captioned [2] - 81:18, 82:12 cardinal [1] - 33:6 care [5] - 32:24, 62:17, 63:1, 65:12, 66:4 career [2] - 19:8, 65:3 careful [2] - 35:16, 86:17 carefully [3] - 35:15, 85:10, 86:18 carried [1] - 84:15 Cartwright [1] - 97:21 case [83] - 3:3, 4:25, 5:13, 5:21, 6:13, 6:14, 9:9, 9:11, 11:3, 12:14, 13:13, 13:16, 13:20, 13:22, 14:6, 14:14, 15:2, 16:7, 16:12, 16:16, 17:1, 17:2, 17:3, 17:21, 18:16, 18:21, 20:19, 24:25, 25:2, 25:21, 27:6, 28:12, 28:18, 29:6, 29:8, 29:17, 30:1, 30:7, 31:4, 31:17, 33:25, 34:1, 38:14, 38:20, 43:18, 45:3, 45:8, 45:19, 47:7, 48:13, 48:20, 53:12, 55:7, 56:13, 57:2, 57:9, 57:19, 61:15, 62:2, 64:16, 66:25, 72:5, 76:7, 76:9, 77:11, 77:24, 79:10, 79:15, 79:16, 93:17, 93:20, 95:19, 101:24, 105:24, 107:4, 108:22, 117:9, 117:10, 117:25, 119:15, 120:8 cases [18] - 12:12, 12:23, 14:3, 14:22, 16:18, 16:21, 17:8, 17:11, 37:21, 37:25, 38:19, 77:2, 103:12, 110:4, 117:6, 117:18, 117:19 cash [3] - 60:15, 68:9, 93:14 casino [1] - 57:22 cast [2] - 30:4, 40:4 categories [1] - 55:24 causal [1] - 103:10 caused [1] - 20:9 causes [2] - 27:19, 39:12 certain [6] - 13:21, 24:10, 72:12, 72:18, 73:16, 117:4 certainly [17] - 16:1, 18:9, 20:24, 28:20, 28:21, 29:11, 30:6, 36:16, 37:3, 39:14, 49:25, 77:20, 80:3, 104:21, 110:17, 119:21, 120:20</p>	<p>CERTIFICATE [1] - 1:25 Certificate [1] - 122:16 certification [54] - 3:5, 4:13, 4:20, 4:23, 5:8, 6:12, 8:8, 8:9, 11:3, 12:13, 13:14, 13:20, 16:13, 18:10, 22:1, 22:4, 25:1, 25:22, 26:5, 26:12, 26:18, 27:9, 27:17, 28:2, 28:8, 28:13, 28:24, 29:16, 29:24, 30:1, 30:11, 37:16, 38:22, 44:20, 44:25, 46:17, 47:3, 47:5, 47:25, 56:14, 57:3, 57:4, 67:6, 69:8, 77:4, 79:2, 80:7, 80:12, 81:21, 84:14, 88:4, 88:22, 96:25, 121:12 certifications [1] - 29:10 certified [6] - 12:15, 23:10, 26:7, 38:24, 44:14, 45:1 Certified [1] - 122:11 certify [3] - 26:4, 43:15, 122:12 certifying [2] - 38:7, 46:22 cetera [1] - 76:3 challenge [2] - 31:20, 61:16 challenged [1] - 55:16 challenges [1] - 56:2 change [11] - 17:7, 25:21, 34:24, 41:20, 42:14, 74:5, 78:21, 78:23, 88:9, 113:14 changed [6] - 17:10, 33:19, 57:10, 68:2, 78:22, 106:10 changes [6] - 26:12, 31:5, 32:19, 33:19, 33:23, 113:14 character [2] - 33:2, 109:12 chart [5] - 34:21, 43:24, 53:22, 63:6, 69:4 chastisement [1] - 81:4 chastising [1] - 81:1 checking [1] - 99:7 CHIEF [1] - 1:20 choose [4] - 18:22, 19:22, 60:1, 116:18 chose [6] - 30:2, 32:10, 36:6, 54:21, 54:22, 103:15 Circuit [13] - 5:21, 5:22, 6:13, 9:9, 9:11, 12:11, 12:13, 12:22, 27:6, 27:8, 70:5, 77:24, 86:10 circuit [3] - 9:18, 29:19, 76:10 circuits [1] - 77:3 circumstance [1] - 26:10 circumstances [4] - 9:8, 32:25, 39:11, 80:1 citations [2] - 30:17, 31:8 cite [9] - 14:5, 30:13, 38:15, 39:24, 90:5, 103:12, 108:22, 117:10, 117:18 cited [6] - 9:24, 16:2, 16:8, 37:21, 38:19, 113:4 civil [2] - 5:1, 29:14 Civil [1] - 3:4 CIVIL [1] - 1:8 claim [29] - 6:4, 6:22, 9:5, 14:9, 17:4, 21:17, 24:25, 31:4, 31:15, 31:17, 32:11, 36:22, 37:12, 47:6, 47:9, 55:11, 56:4, 70:1, 70:2, 77:25, 79:4, 79:13, 80:4, 81:9, 89:12, 99:9, 99:14, 120:7</p>	<p>claimed [2] - 8:18, 103:11 claiming [4] - 89:22, 89:23, 91:4, 98:24 claims [15] - 5:6, 5:7, 8:1, 13:1, 16:3, 23:13, 24:23, 28:16, 33:4, 50:16, 61:9, 61:21, 67:22, 120:17 class [145] - 1:5, 3:5, 4:12, 4:20, 4:23, 5:8, 6:11, 6:21, 7:5, 7:7, 8:9, 11:3, 12:13, 13:23, 14:2, 14:4, 14:7, 14:17, 14:21, 14:23, 15:2, 15:3, 15:18, 16:13, 16:16, 18:1, 18:6, 18:9, 18:17, 18:19, 22:1, 22:16, 23:10, 23:17, 23:20, 23:23, 25:1, 25:11, 25:22, 25:24, 26:4, 26:6, 26:7, 26:9, 26:12, 26:14, 26:18, 26:24, 27:2, 27:9, 27:17, 28:2, 28:8, 28:10, 28:13, 28:18, 28:24, 29:10, 29:15, 29:23, 30:1, 30:8, 30:11, 31:10, 36:15, 37:14, 37:15, 37:23, 38:2, 38:4, 38:8, 38:9, 38:21, 38:24, 39:1, 41:6, 41:14, 42:10, 42:11, 43:15, 43:23, 44:5, 44:14, 44:15, 44:18, 44:20, 44:24, 45:1, 46:5, 46:7, 46:17, 46:22, 46:24, 47:3, 47:5, 47:9, 47:12, 47:13, 47:25, 48:11, 50:15, 50:17, 50:19, 50:20, 50:25, 51:4, 51:7, 53:16, 55:19, 55:21, 56:14, 56:18, 57:4, 63:4, 63:25, 64:4, 64:10, 64:17, 65:9, 66:10, 66:20, 67:6, 67:8, 69:8, 70:15, 72:17, 72:21, 76:5, 76:18, 77:4, 77:10, 77:13, 78:1, 79:2, 80:6, 80:11, 85:5, 86:2, 86:15, 96:25, 121:12 classes [4] - 22:8, 23:1, 46:5, 46:6 classwide [20] - 6:25, 7:10, 7:13, 7:16, 7:25, 8:1, 8:8, 9:5, 11:8, 11:24, 12:8, 21:1, 21:20, 21:23, 26:16, 26:19, 120:9, 120:13, 120:15, 120:25 clear [6] - 8:14, 70:5, 82:14, 85:13, 86:16, 120:9 clearer [1] - 51:17 clearly [13] - 7:9, 7:13, 10:25, 12:8, 14:22, 16:4, 19:14, 69:22, 76:15, 77:1, 91:5, 99:25 CLERK [1] - 3:1 client [1] - 29:4 clients [1] - 13:10 close [8] - 11:10, 11:12, 11:15, 11:16, 44:18, 60:5, 71:14, 93:15 closer [1] - 68:3 closing [1] - 79:1 cloth [2] - 40:2, 48:9 clue [1] - 109:25 Code [2] - 9:20, 82:6 collapse [1] - 61:13 colleagues [1] - 46:10 collection [1] - 119:12 College [1] - 2:13 color [2] - 74:4, 111:22 colorable [4] - 6:22, 79:4, 79:6, 79:11 COMEAU [1] - 1:4 comfortable [2] - 72:24, 73:3 coming [2] - 36:18, 105:16</p>

<p>comment [1] - 116:15</p> <p>commented [1] - 9:16</p> <p>committee [1] - 92:22</p> <p>commodities [1] - 65:4</p> <p>common [21] - 6:20, 7:4, 7:6, 10:6, 10:8, 10:24, 11:1, 12:16, 14:19, 26:15, 26:18, 26:20, 38:16, 38:18, 38:22, 38:23, 43:12, 43:17, 51:1, 92:3, 119:5</p> <p>commonality [7] - 5:1, 21:19, 25:8, 25:22, 26:13, 26:22, 62:4</p> <p>commonalty [1] - 8:3</p> <p>communicate [4] - 63:11, 64:2, 64:12, 87:11</p> <p>communicating [1] - 63:18</p> <p>communications [1] - 88:11</p> <p>community [1] - 82:18</p> <p>companies [6] - 52:5, 52:6, 53:14, 54:1, 103:22, 116:7</p> <p>COMPANIES [1] - 1:6</p> <p>company [9] - 51:20, 52:9, 53:18, 53:24, 57:16, 59:12, 62:22, 82:19, 84:21</p> <p>Company's [1] - 90:14</p> <p>company's [1] - 52:12</p> <p>comparable [1] - 119:20</p> <p>compare [2] - 75:14, 110:4</p> <p>compared [2] - 44:2, 64:11</p> <p>comparison [1] - 75:13</p> <p>compatible [2] - 23:19, 69:23</p> <p>competent [1] - 43:8</p> <p>competing [1] - 23:17</p> <p>competitors [1] - 102:6</p> <p>competitors' [1] - 102:7</p> <p>complain [1] - 7:6</p> <p>complaint [14] - 5:9, 14:9, 17:5, 27:13, 40:7, 55:6, 55:8, 55:9, 80:16, 98:12, 105:9, 105:10, 105:11</p> <p>complete [7] - 17:13, 17:21, 28:21, 81:9, 95:25, 96:4, 96:22</p> <p>completed [2] - 17:16, 28:3</p> <p>completion [1] - 96:24</p> <p>complex [3] - 14:11, 99:7, 101:19</p> <p>complexities [1] - 23:8</p> <p>complexity [4] - 23:1, 98:21, 100:12, 100:13</p> <p>complicated [3] - 14:12, 29:8, 45:9</p> <p>comply [2] - 91:22, 115:3</p> <p>component [1] - 27:1</p> <p>comport [1] - 82:6</p> <p>composition [1] - 76:1</p> <p>comprehensive [1] - 86:20</p> <p>compromise [1] - 50:8</p> <p>conceded [1] - 65:6</p> <p>conceivable [2] - 8:25, 15:5</p> <p>conceive [1] - 33:18</p> <p>concentrating [1] - 16:3</p> <p>concentration [2] - 7:18, 75:11</p> <p>concept [2] - 51:3, 113:10</p> <p>concepts [1] - 14:10</p> <p>concerned [2] - 44:9, 44:11</p>	<p>concerning [1] - 88:8</p> <p>concerted [1] - 40:5</p> <p>conclude [2] - 18:2, 47:5</p> <p>Concluded [1] - 121:22</p> <p>concluded [1] - 96:13</p> <p>concludes [1] - 22:2</p> <p>concrete [1] - 59:25</p> <p>conditions [4] - 36:20, 60:6, 60:18, 78:22</p> <p>conduct [8] - 6:20, 7:4, 7:6, 7:12, 33:2, 68:5, 85:4, 109:12</p> <p>conducted [3] - 25:25, 98:15, 98:24</p> <p>conducting [1] - 98:13</p> <p>confine [1] - 115:15</p> <p>conflict [10] - 5:3, 18:25, 19:19, 27:4, 38:8, 42:9, 42:19, 42:24, 85:18, 85:20</p> <p>conflicts [12] - 18:1, 18:5, 25:9, 26:24, 38:4, 38:11, 41:6, 46:24, 50:10, 51:3, 51:6, 51:17</p> <p>conjunction [1] - 68:22</p> <p>connection [4] - 4:23, 5:13, 15:17, 117:2</p> <p>consecutive [1] - 65:1</p> <p>consecutively [2] - 66:5, 66:6</p> <p>consequence [8] - 14:20, 15:7, 15:24, 20:1, 68:10, 68:21, 78:22, 78:23</p> <p>consequences [1] - 23:21</p> <p>conserve [2] - 118:9, 119:22</p> <p>conserving [2] - 118:10, 118:14</p> <p>consider [30] - 9:19, 10:3, 27:19, 27:21, 36:24, 39:10, 39:12, 41:21, 48:24, 58:4, 68:21, 72:7, 74:8, 76:13, 78:25, 79:14, 79:25, 94:19, 96:19, 106:17, 107:20, 108:24, 112:1, 117:25, 118:3, 118:10, 119:14, 119:15, 119:16, 120:11</p> <p>consideration [12] - 9:13, 9:22, 18:14, 25:19, 36:4, 37:8, 40:15, 40:18, 47:16, 57:14, 107:7, 108:19</p> <p>considerations [2] - 36:2, 39:3</p> <p>considered [24] - 6:15, 7:21, 8:13, 9:2, 9:4, 10:6, 30:19, 72:1, 74:1, 75:12, 78:12, 78:14, 79:12, 79:18, 79:23, 80:2, 94:13, 95:2, 95:16, 108:15, 109:1, 114:22, 114:23, 116:16</p> <p>considering [6] - 6:18, 6:23, 12:20, 47:4, 78:17, 79:5</p> <p>consisted [1] - 57:17</p> <p>consistent [8] - 8:22, 60:2, 79:15, 79:16, 79:19, 79:20, 79:21</p> <p>consistently [2] - 52:10, 82:3</p> <p>consists [1] - 30:11</p> <p>constitute [2] - 32:21, 83:14</p> <p>constitutes [2] - 25:21, 56:1</p> <p>Constitutional [1] - 27:1</p> <p>constrained [1] - 60:14</p> <p>constraints [1] - 25:16</p> <p>construction [1] - 85:23</p> <p>construed [2] - 95:10, 102:21</p> <p>consultant [1] - 116:7</p>	<p>contacted [1] - 13:15</p> <p>contained [2] - 82:1, 83:5</p> <p>contains [3] - 93:6, 93:11, 100:2</p> <p>contemplated [1] - 32:12</p> <p>contemplates [2] - 26:6, 56:9</p> <p>contend [1] - 32:2</p> <p>content [2] - 104:24, 105:1</p> <p>contention [2] - 26:15, 38:23</p> <p>contents [1] - 21:23</p> <p>contest [1] - 72:15</p> <p>context [9] - 15:12, 25:6, 30:17, 30:21, 45:8, 51:16, 75:4, 117:13, 118:19</p> <p>continue [3] - 19:7, 36:25, 38:16</p> <p>continued [2] - 30:4, 82:9</p> <p>continues [2] - 32:5, 36:25</p> <p>continuously [1] - 85:7</p> <p>contradicted [2] - 90:22, 104:2</p> <p>contradictory [1] - 71:10</p> <p>contrary [1] - 108:5</p> <p>contrast [1] - 30:24</p> <p>contrasting [1] - 40:21</p> <p>contributed [1] - 116:8</p> <p>contribution [6] - 21:13, 52:7, 64:20, 64:21, 66:1, 67:2</p> <p>contributions [11] - 41:18, 44:7, 52:8, 52:12, 82:19, 83:22, 84:2, 84:6, 84:21, 91:2, 91:18</p> <p>contrivances [1] - 37:3</p> <p>contrived [1] - 35:24</p> <p>control [6] - 15:21, 52:19, 58:12, 59:1, 93:25, 119:12</p> <p>controlling [1] - 15:19</p> <p>conventional [2] - 37:12, 39:25</p> <p>converging [1] - 34:2</p> <p>converts [1] - 61:25</p> <p>cooper [1] - 57:18</p> <p>COOPER [1] - 1:15</p> <p>copy [1] - 92:14</p> <p>corporate [1] - 88:7</p> <p>CORPORATION [1] - 1:11</p> <p>Corporation [2] - 25:3, 81:20</p> <p>correct [7] - 43:25, 45:17, 59:21, 64:8, 73:19, 80:18, 94:20</p> <p>counsel [15] - 3:8, 25:7, 25:12, 67:5, 67:17, 68:18, 68:23, 69:24, 72:11, 77:16, 91:10, 102:4, 116:16, 117:21, 121:18</p> <p>count [4] - 55:9, 55:10, 98:9, 98:11</p> <p>Count [6] - 80:17, 80:19, 86:9, 89:11, 103:9</p> <p>country [2] - 46:11, 51:25</p> <p>Counts [1] - 121:14</p> <p>counts [3] - 55:10, 80:16, 81:14</p> <p>couple [2] - 30:17, 45:25</p> <p>course [20] - 8:15, 10:17, 17:2, 17:7, 21:8, 25:16, 28:19, 29:25, 34:25, 35:7, 50:2, 54:21, 58:24, 63:4, 65:20, 68:16, 85:3, 89:14, 97:13, 116:5</p> <p>court [19] - 5:24, 11:5, 15:8, 16:6, 18:20,</p>
--	--	--

<p>20:10, 20:12, 20:13, 21:2, 22:12, 26:17, 38:21, 46:11, 46:16, 61:21, 114:11, 114:12, 120:10</p> <p>Court [62] - 4:22, 5:20, 5:24, 6:13, 7:1, 7:3, 7:25, 12:5, 14:13, 17:2, 18:12, 20:20, 22:2, 23:22, 24:21, 26:1, 26:25, 27:11, 27:15, 27:16, 28:15, 29:20, 32:16, 32:22, 33:25, 35:12, 36:10, 36:13, 36:19, 39:15, 41:10, 41:12, 44:11, 45:18, 46:9, 46:23, 47:4, 48:7, 50:21, 54:24, 70:9, 70:10, 71:13, 72:8, 78:3, 86:12, 89:9, 91:6, 94:6, 95:2, 95:18, 97:21, 105:7, 105:13, 108:24, 111:14, 117:8, 117:21, 120:22, 122:10, 122:11</p> <p>COURT [132] - 1:1, 3:2, 3:20, 4:3, 4:10, 4:19, 13:7, 16:10, 16:12, 17:15, 17:23, 18:3, 20:3, 20:6, 22:4, 22:7, 22:17, 22:22, 22:24, 23:3, 23:5, 23:14, 24:2, 24:4, 24:12, 24:14, 24:16, 24:18, 25:15, 27:25, 28:7, 28:20, 29:7, 34:1, 34:8, 34:21, 34:24, 35:20, 37:13, 37:18, 37:21, 38:7, 39:19, 40:22, 42:14, 42:17, 43:2, 43:24, 44:9, 44:13, 45:12, 45:24, 46:15, 46:20, 49:5, 49:13, 49:25, 51:10, 56:24, 57:12, 57:21, 58:16, 58:19, 58:22, 59:18, 59:22, 61:3, 64:4, 67:13, 70:14, 72:16, 73:5, 73:15, 74:4, 74:17, 74:20, 75:8, 75:13, 75:17, 76:17, 77:6, 78:4, 79:5, 80:6, 80:9, 80:19, 81:4, 81:7, 83:16, 83:25, 86:7, 88:14, 89:7, 94:15, 94:19, 94:21, 95:3, 95:24, 96:9, 96:18, 97:1, 97:7, 98:10, 100:4, 100:14, 102:3, 102:25, 103:2, 103:4, 104:14, 104:18, 105:3, 109:19, 112:10, 112:16, 115:5, 115:11, 115:13, 115:21, 115:24, 116:17, 116:21, 116:25, 117:15, 118:18, 119:2, 119:7, 119:23, 121:2, 121:6, 121:8, 121:16</p> <p>Court's [7] - 6:19, 6:23, 27:19, 27:21, 31:22, 49:24</p> <p>courthouse [1] - 46:2</p> <p>COURTHOUSE [1] - 1:14</p> <p>courts [9] - 14:4, 14:14, 15:5, 15:11, 22:12, 29:19, 38:21, 61:8, 61:25</p> <p>Courts [1] - 24:22</p> <p>covered [1] - 78:3</p> <p>covering [1] - 85:11</p> <p>create [1] - 46:13</p> <p>created [2] - 40:2, 50:10</p> <p>creates [4] - 38:12, 41:5, 42:18, 51:3</p> <p>creating [2] - 38:4, 47:14</p> <p>creation [2] - 82:16, 106:19</p> <p>credibility [1] - 66:22</p> <p>credit [1] - 11:22</p> <p>criminal [1] - 104:5</p> <p>crisis [1] - 78:8</p> <p>criteria [5] - 12:10, 23:12, 114:9, 120:6</p> <p>critical [1] - 29:8</p>	<p>criticisms [2] - 13:21, 60:6</p> <p>criticized [1] - 73:15</p> <p>cross [1] - 104:21</p> <p>cross-motion [1] - 104:21</p> <p>crucial [1] - 92:4</p> <p>CSR [1] - 122:14</p> <p>current [4] - 90:12, 90:16, 91:15, 98:4</p> <p>customer [1] - 101:10</p> <p>cut [1] - 38:3</p>	<p>17:12, 17:20, 19:14, 19:21, 19:24, 21:5, 24:22, 24:24, 25:12, 32:12, 32:15, 33:8, 34:13, 34:18, 35:2, 35:12, 43:6, 48:23, 57:9, 67:24, 67:25, 69:10, 69:19, 71:20, 71:22, 72:4, 72:15, 78:24, 79:24, 89:15, 89:18, 90:3, 91:4, 92:6, 93:8, 94:6, 94:22, 95:23, 97:19, 98:5, 98:12, 98:22, 99:9, 105:5, 106:13, 120:14</p> <p>defendants' [15] - 6:20, 7:4, 8:5, 9:13, 11:13, 18:5, 69:16, 76:9, 78:5, 90:16, 90:22, 92:13, 97:9, 97:24, 104:20</p> <p>defense [1] - 73:17</p> <p>defensive [5] - 34:16, 34:19, 35:3, 35:5, 35:10</p> <p>deference [3] - 91:14, 97:21, 97:22</p> <p>defies [2] - 56:23, 59:19</p> <p>defined [3] - 42:11, 116:3, 117:2</p> <p>definitely [1] - 56:16</p> <p>definitive [1] - 71:24</p> <p>degree [2] - 23:1, 110:10</p> <p>delay [5] - 20:9, 69:6, 69:7, 69:14, 69:15</p> <p>delayed [2] - 17:1, 96:23</p> <p>deluged [1] - 61:9</p> <p>demographic [4] - 18:14, 113:14, 113:16, 113:18</p> <p>demographics [11] - 7:19, 36:7, 53:21, 72:7, 74:23, 75:7, 78:11, 78:24, 106:11, 107:21, 108:5</p> <p>demonstrably [3] - 33:24, 44:15, 48:19</p> <p>demonstrate [8] - 6:7, 10:23, 10:24, 11:7, 17:4, 26:14, 68:14, 114:15</p> <p>demonstrated [1] - 114:22</p> <p>demonstrates [3] - 41:21, 98:24, 108:4</p> <p>denied [1] - 38:21</p> <p>denying [1] - 81:1</p> <p>departing [1] - 74:8</p> <p>Department [7] - 10:2, 107:6, 107:8, 107:14, 112:25, 113:4</p> <p>deposition [21] - 9:15, 11:25, 17:13, 59:9, 59:13, 63:10, 65:7, 68:16, 79:25, 80:2, 88:21, 88:25, 99:17, 101:9, 101:23, 108:8, 111:4, 111:22, 116:5, 116:13</p> <p>depositions [5] - 8:15, 10:17, 17:22, 28:5, 30:18</p> <p>depth [1] - 100:20</p> <p>depths [2] - 59:3, 63:6</p> <p>DEPUTY [1] - 3:1</p> <p>derivative [1] - 12:23</p> <p>derived [2] - 6:12, 117:24</p> <p>describe [2] - 73:22, 107:10</p> <p>describes [3] - 10:13, 10:14, 11:18</p> <p>deserving [1] - 29:10</p> <p>designed [3] - 54:10, 68:14, 117:3</p> <p>desirability [1] - 16:3</p> <p>desirable [1] - 16:4</p> <p>desire [1] - 118:6</p> <p>despite [2] - 29:19, 30:9</p> <p>detail [3] - 25:13, 35:17, 43:18</p>
D		
<p>damage [8] - 11:23, 69:1, 71:15, 86:1, 103:6, 115:2, 120:23, 120:25</p> <p>damages [20] - 6:9, 6:23, 6:25, 11:8, 21:10, 21:12, 21:22, 68:16, 69:2, 69:25, 70:2, 70:3, 70:23, 73:24, 103:11, 113:22, 113:23, 114:3, 120:1, 120:7</p> <p>data [1] - 92:23</p> <p>DATE [1] - 122:17</p> <p>date [10] - 3:4, 37:23, 38:15, 53:25, 57:7, 70:20, 82:10, 84:16, 96:19, 113:23</p> <p>dated [1] - 90:8</p> <p>Daubert [5] - 3:7, 4:15, 105:6, 114:9, 121:16</p> <p>daughter [3] - 59:5, 63:15, 76:6</p> <p>daughter-in-law [2] - 59:5, 63:15</p> <p>DAVID [1] - 2:12</p> <p>David [2] - 4:4, 105:5</p> <p>dead [1] - 28:9</p> <p>deadline [2] - 97:1, 97:2</p> <p>deal [5] - 38:11, 96:18, 98:18, 110:13, 117:6</p> <p>dealing [4] - 28:21, 29:6, 61:18, 111:25</p> <p>deals [1] - 108:19</p> <p>dealt [1] - 110:25</p> <p>December [4] - 36:6, 39:15, 85:5, 89:20</p> <p>decide [1] - 97:11</p> <p>decided [5] - 17:3, 28:8, 48:13, 108:16, 109:2</p> <p>deciding [2] - 33:18, 36:4</p> <p>decision [20] - 5:18, 6:21, 9:18, 19:20, 27:8, 27:9, 28:17, 34:9, 34:19, 35:9, 36:19, 38:3, 69:16, 80:11, 86:12, 104:18, 109:11, 121:10, 121:11</p> <p>decisions [4] - 6:12, 15:13, 49:1, 78:7</p> <p>declaration [5] - 90:6, 92:14, 98:23, 99:17, 99:18</p> <p>decline [3] - 59:3, 61:6, 62:11</p> <p>declines [1] - 60:25</p> <p>defendant [6] - 6:3, 6:8, 28:23, 44:16, 76:14, 89:12</p> <p>Defendants [1] - 1:13</p> <p>DEFENDANTS [2] - 2:9, 2:14</p> <p>defendants [64] - 3:7, 3:17, 3:22, 3:24, 4:6, 4:9, 4:14, 5:10, 5:15, 8:10, 9:2, 9:24, 13:10, 13:25, 14:5, 14:7, 16:1,</p>		

<p>detailed [2] - 31:6, 85:1</p> <p>deteriorated [1] - 78:13</p> <p>determination [6] - 6:16, 6:20, 16:6, 18:17, 69:12, 109:8</p> <p>determinations [3] - 15:6, 40:23, 61:16</p> <p>determinative [2] - 10:9, 12:21</p> <p>determine [5] - 7:1, 60:17, 113:23, 120:16, 120:18</p> <p>determined [2] - 61:4, 69:9</p> <p>develop [2] - 19:12, 75:3</p> <p>developed [6] - 8:14, 19:14, 21:21, 21:22, 28:1, 74:9</p> <p>developing [2] - 72:8, 79:14</p> <p>devolve [1] - 38:24</p> <p>devoted [1] - 10:19</p> <p>dictated [1] - 21:13</p> <p>die [1] - 58:11</p> <p>different [39] - 8:10, 10:12, 15:6, 15:14, 15:15, 18:23, 20:15, 23:11, 23:20, 23:21, 29:10, 34:9, 47:14, 55:24, 56:6, 61:8, 61:10, 62:23, 63:3, 70:1, 70:3, 70:4, 71:5, 72:10, 73:13, 75:11, 77:1, 77:10, 77:21, 86:13, 86:14, 86:15, 87:2, 87:13, 97:25, 99:4, 101:18, 105:11</p> <p>difficult [3] - 35:18, 68:21, 116:22</p> <p>difficulties [2] - 16:7, 67:24</p> <p>difficulty [3] - 69:24, 75:24, 117:19</p> <p>diligence [3] - 32:24, 87:18, 88:12</p> <p>diminish [1] - 44:2</p> <p>direct [6] - 84:6, 92:1, 92:3, 93:4, 93:6, 117:11</p> <p>directed [9] - 8:7, 52:18, 101:15, 105:24, 107:9, 109:14, 113:1, 115:24, 116:2</p> <p>direction [1] - 40:24</p> <p>directly [2] - 26:5, 44:4</p> <p>disadvantaged [1] - 44:21</p> <p>disadvantaging [1] - 72:20</p> <p>disagree [2] - 43:3, 90:21</p> <p>disagreements [2] - 16:22, 21:9</p> <p>discharge [2] - 5:11, 5:16</p> <p>disciplinary [4] - 87:21, 104:4</p> <p>disciplined [1] - 66:15</p> <p>disclosures [1] - 28:5</p> <p>disconnect [1] - 31:16</p> <p>discovered [2] - 100:22, 101:1</p> <p>discovery [5] - 17:13, 17:16, 28:4, 68:24, 96:13</p> <p>discretion [7] - 60:20, 74:5, 81:12, 83:5, 84:19, 84:25, 85:14</p> <p>discretionary [2] - 52:9, 61:16</p> <p>discuss [1] - 54:23</p> <p>discussed [2] - 42:20, 108:17</p> <p>discusses [1] - 9:21</p> <p>disjointed [1] - 69:5</p> <p>dismiss [4] - 80:23, 80:24, 89:20, 98:2</p> <p>disposition [1] - 5:8</p> <p>dispositive [1] - 4:25</p>	<p>dispute [3] - 48:1, 55:17, 102:20</p> <p>disputed [1] - 98:18</p> <p>disputes [2] - 27:16, 27:18</p> <p>disputing [1] - 48:21</p> <p>disregard [1] - 39:12</p> <p>disseminated [1] - 82:21</p> <p>distinctly [2] - 53:9, 64:11</p> <p>distributed [2] - 70:24, 82:21</p> <p>distribution [1] - 59:12</p> <p>distributions [1] - 58:7</p> <p>District [2] - 122:11</p> <p>district [1] - 22:12</p> <p>DISTRICT [3] - 1:1, 1:1, 1:20</p> <p>diversification [1] - 92:15</p> <p>diversified [1] - 64:3</p> <p>diversifying [1] - 92:18</p> <p>divide [2] - 112:24, 113:6</p> <p>divided [2] - 55:24, 57:4</p> <p>dividing [1] - 107:12</p> <p>divorced [2] - 36:1, 36:2</p> <p>Docket [2] - 121:12, 121:13</p> <p>Dockets [1] - 121:16</p> <p>doctor [2] - 99:7, 99:8</p> <p>document [44] - 8:17, 8:19, 20:13, 21:11, 32:4, 68:22, 70:25, 81:17, 81:23, 81:24, 82:1, 82:8, 83:2, 83:17, 84:1, 84:9, 84:12, 84:13, 84:17, 85:12, 89:4, 89:19, 89:22, 89:23, 89:25, 90:2, 90:5, 90:7, 90:8, 90:9, 90:10, 90:17, 91:4, 91:6, 91:8, 92:10, 93:24, 97:20, 98:1, 98:3, 98:5</p> <p>documents [12] - 5:17, 8:18, 63:12, 81:20, 83:4, 83:14, 85:8, 85:9, 85:21, 88:9, 91:21, 98:23</p> <p>dog [1] - 65:14</p> <p>dollars [2] - 46:1, 65:15</p> <p>done [28] - 17:22, 29:18, 30:6, 45:14, 45:15, 45:19, 48:19, 49:21, 50:1, 57:23, 60:12, 61:10, 65:24, 70:12, 77:17, 77:19, 78:18, 84:2, 103:18, 104:11, 109:23, 111:2, 111:17, 114:14, 117:13, 118:21, 118:22, 119:20</p> <p>Donio [2] - 55:5, 55:21</p> <p>Donio's [2] - 55:22, 103:13</p> <p>Donovan [3] - 5:21, 5:24, 6:5</p> <p>door [2] - 46:2, 56:6</p> <p>doubt [1] - 6:5</p> <p>doubtful [1] - 12:14</p> <p>Doug [1] - 3:21</p> <p>DOUGLAS [1] - 2:8</p> <p>down [12] - 24:2, 24:4, 33:24, 34:3, 35:7, 35:8, 42:2, 46:15, 57:23, 61:20, 86:23, 87:8</p> <p>Dr [30] - 11:10, 11:19, 11:25, 20:23, 21:6, 30:13, 31:20, 36:7, 39:23, 46:13, 68:3, 68:15, 71:12, 71:14, 71:22, 73:22, 74:25, 75:3, 93:16, 104:20, 105:17, 105:21, 106:4, 106:16, 108:7, 110:3, 115:18, 117:24, 118:16, 119:17</p>	<p>draft [3] - 75:10, 90:9, 98:5</p> <p>drafted [1] - 95:15</p> <p>drawn [1] - 85:10</p> <p>Drinker [3] - 3:23, 4:5, 4:8</p> <p>DRINKER [1] - 2:10</p> <p>drive [1] - 26:20</p> <p>driven [5] - 36:5, 37:10, 37:11, 50:4</p> <p>dropping [1] - 34:3</p> <p>drops [1] - 34:11</p> <p>drove [1] - 38:23</p> <p>due [2] - 87:18, 88:12</p> <p>Dukes [8] - 10:9, 12:21, 25:20, 25:24, 26:12, 38:16, 38:19, 43:16</p> <p>duped [1] - 104:15</p> <p>Dupler [1] - 14:14</p> <p>duration [1] - 32:11</p> <p>during [16] - 31:3, 33:10, 33:21, 37:9, 38:6, 41:7, 42:3, 42:7, 49:3, 50:13, 50:22, 60:24, 61:12, 78:8, 85:4, 116:5</p> <p>duties [3] - 5:16, 49:13, 98:13</p> <p>duty [12] - 5:11, 9:12, 21:3, 36:20, 37:12, 48:15, 48:20, 49:19, 56:1, 56:3, 60:4, 89:13</p> <p>dying [1] - 57:19</p> <p>dynamic [2] - 57:12, 60:13</p>
E		
<p>earliest [1] - 28:9</p> <p>early [6] - 28:10, 34:3, 34:22, 51:23, 54:9, 63:7</p> <p>earned [1] - 6:2</p> <p>earning [1] - 59:8</p> <p>easel [1] - 63:6</p> <p>easier [1] - 22:13</p> <p>East [1] - 2:13</p> <p>easy [1] - 12:1</p> <p>economic [2] - 33:17, 117:19</p> <p>education [3] - 48:18, 105:22, 110:18</p> <p>educational [1] - 101:4</p> <p>effect [6] - 47:15, 85:7, 90:11, 93:20, 93:23, 98:7</p> <p>effort [3] - 13:16, 28:25, 35:17</p> <p>Eisenberg [2] - 12:14, 12:23</p> <p>either [12] - 29:12, 42:25, 45:4, 46:20, 51:1, 64:14, 66:24, 66:25, 71:5, 71:15, 99:21, 109:10</p> <p>elected [1] - 20:17</p> <p>element [3] - 7:18, 12:22, 105:20</p> <p>elements [8] - 5:7, 8:4, 27:18, 52:17, 54:4, 54:5, 106:25, 114:8</p> <p>eliminates [1] - 36:23</p> <p>eliminating [1] - 38:4</p> <p>email [3] - 99:10, 99:15</p> <p>emails [5] - 87:25, 88:3, 88:14, 88:22, 88:23</p> <p>embarked [1] - 65:3</p> <p>empirically [1] - 48:7</p> <p>employ [4] - 9:10, 19:21, 119:14, 119:16</p>		

<p>employed [4] - 11:13, 59:11, 64:19, 65:18</p> <p>employee [4] - 92:23, 101:9, 109:14, 109:22</p> <p>employees [9] - 39:9, 51:24, 52:4, 53:14, 78:20, 93:1, 98:16, 108:6, 116:18</p> <p>employer [3] - 66:15, 66:18, 67:3</p> <p>employment [2] - 19:11, 61:2</p> <p>encouraged [1] - 27:11</p> <p>end [10] - 23:19, 30:2, 42:4, 57:6, 69:12, 77:6, 111:13, 116:3, 117:4, 121:20</p> <p>ended [1] - 42:4</p> <p>endorsed [1] - 5:21</p> <p>ends [1] - 53:11</p> <p>engaged [2] - 33:8, 86:11</p> <p>Engineering [1] - 81:20</p> <p>English [4] - 14:1, 14:2, 14:5, 64:13</p> <p>enjoyed [1] - 54:17</p> <p>enlarge [1] - 37:13</p> <p>enrich [1] - 12:24</p> <p>entails [1] - 9:8</p> <p>enter [1] - 3:8</p> <p>entering [1] - 75:21</p> <p>enterprise [6] - 33:2, 109:12, 109:13, 110:25</p> <p>entire [2] - 35:23, 38:2</p> <p>entirely [4] - 30:12, 33:5, 57:16, 57:17</p> <p>entirety [3] - 7:16, 55:20, 72:5</p> <p>entities [1] - 24:24</p> <p>entitled [9] - 66:22, 89:19, 91:6, 91:8, 97:13, 97:20, 97:22, 98:1, 98:3</p> <p>entity [1] - 53:12</p> <p>enunciated [1] - 25:23</p> <p>enunciator [1] - 105:19</p> <p>equal [1] - 97:8</p> <p>equitable [1] - 17:4</p> <p>equities [16] - 33:11, 33:12, 33:13, 33:24, 34:10, 35:6, 35:8, 36:22, 48:3, 50:17, 68:9, 72:18, 87:16, 102:15, 105:15</p> <p>equity [27] - 7:18, 11:9, 15:4, 15:6, 18:7, 19:1, 30:15, 34:4, 34:11, 37:9, 41:25, 47:24, 60:16, 61:24, 64:17, 72:18, 72:25, 73:1, 73:3, 73:12, 74:9, 77:15, 78:20, 102:6, 102:7, 102:12, 102:18</p> <p>Equity [2] - 5:12, 14:9</p> <p>equivalent [1] - 99:6</p> <p>ERISA [29] - 5:6, 5:9, 11:2, 12:11, 12:23, 13:15, 14:11, 15:2, 15:11, 17:5, 32:2, 32:23, 33:3, 38:19, 39:6, 47:9, 48:15, 56:4, 83:4, 83:7, 83:15, 84:24, 85:2, 91:10, 91:16, 91:19, 91:22, 109:6, 116:6</p> <p>erroneously [1] - 19:16</p> <p>error [2] - 120:18</p> <p>especially [7] - 14:15, 27:14, 61:11, 78:8, 89:4, 102:20</p> <p>ESQUIRE [7] - 2:3, 2:4, 2:7, 2:8, 2:11, 2:12, 2:13</p>	<p>essentially [15] - 5:10, 11:25, 13:13, 15:12, 21:11, 24:24, 29:16, 53:1, 53:10, 55:17, 59:6, 61:25, 71:13, 79:2, 119:13</p> <p>establish [1] - 92:24</p> <p>established [3] - 26:22, 81:24, 95:19</p> <p>establishing [1] - 83:7</p> <p>et [4] - 1:11, 3:3, 3:4, 76:2</p> <p>evaluate [1] - 9:10</p> <p>evaluating [1] - 25:22</p> <p>evaluation [3] - 27:12, 33:16, 34:20</p> <p>evens [1] - 38:8</p> <p>evidence [12] - 7:23, 12:4, 27:12, 27:13, 27:20, 27:22, 30:10, 39:5, 100:3, 101:2, 101:21, 114:22</p> <p>evidenced [1] - 35:3</p> <p>exact [1] - 34:10</p> <p>exactly [3] - 56:5, 71:22, 88:19</p> <p>examine [1] - 59:1</p> <p>examined [2] - 76:10, 83:21</p> <p>example [8] - 38:4, 44:8, 45:10, 45:23, 47:8, 48:13, 54:16, 57:24</p> <p>examples [6] - 12:12, 15:3, 35:15, 117:19, 117:20, 119:8</p> <p>exceed [1] - 11:22</p> <p>exceeded [1] - 11:21</p> <p>exceeds [1] - 32:15</p> <p>except [1] - 70:18</p> <p>exception [2] - 17:17, 25:24</p> <p>excerpt [2] - 9:24, 34:13</p> <p>excerpts [1] - 33:8</p> <p>excess [1] - 8:8</p> <p>Excessive [2] - 5:12, 14:9</p> <p>excessive [4] - 7:19, 47:10, 47:11, 50:17</p> <p>exchange [2] - 28:5, 96:24</p> <p>exchanged [2] - 88:1, 96:7</p> <p>excluded [2] - 50:19, 50:20</p> <p>excludes [1] - 57:8</p> <p>excluding [1] - 42:23</p> <p>exclusive [1] - 20:25</p> <p>excuse [8] - 8:9, 9:1, 11:16, 18:17, 20:23, 23:12, 27:20, 33:11</p> <p>executed [2] - 90:10, 98:7</p> <p>exercise [3] - 74:4, 74:15, 85:14</p> <p>exercising [1] - 81:12</p> <p>Exhibit [5] - 90:5, 90:7, 98:25, 99:2, 99:18</p> <p>exhibit [1] - 92:13</p> <p>Exhibits [1] - 98:22</p> <p>exhibits [1] - 71:12</p> <p>exist [1] - 97:12</p> <p>existed [3] - 13:18, 95:14</p> <p>existence [5] - 12:17, 25:9, 52:2, 89:16, 94:1</p> <p>existing [2] - 39:13, 82:7</p> <p>exists [2] - 55:2, 83:17</p> <p>expand [1] - 25:6</p> <p>expect [1] - 121:19</p>	<p>expected [3] - 31:24, 53:6, 60:9</p> <p>expense [1] - 29:5</p> <p>experience [23] - 7:13, 13:4, 98:20, 100:11, 101:8, 101:13, 101:14, 101:21, 104:16, 105:22, 109:21, 110:18, 111:15, 111:17, 111:24, 115:18, 115:21, 116:12, 116:25, 118:21, 119:3</p> <p>experienced [1] - 68:1</p> <p>expert [41] - 9:14, 17:11, 17:14, 17:15, 17:18, 17:21, 21:8, 27:22, 28:5, 28:6, 30:12, 69:9, 69:11, 69:14, 69:16, 75:23, 78:6, 78:13, 94:3, 94:5, 94:7, 95:11, 95:13, 95:18, 95:21, 96:3, 96:13, 96:21, 96:24, 109:9, 109:16, 110:21, 110:22, 111:11, 111:14, 111:15, 112:6, 112:7, 115:1</p> <p>expert's [2] - 96:19, 97:9</p> <p>experts [4] - 15:21, 96:7, 111:12, 111:13</p> <p>experts' [1] - 104:23</p> <p>explain [6] - 31:11, 63:20, 83:20, 88:22, 96:5, 113:4</p> <p>explained [3] - 68:20, 113:5, 116:12</p> <p>explicitly [1] - 91:19</p> <p>extended [2] - 69:1, 121:5</p> <p>extending [1] - 38:9</p> <p>extends [3] - 16:14, 27:20, 27:22</p> <p>extensive [5] - 15:20, 31:8, 76:9, 103:8, 103:23</p> <p>extent [6] - 6:15, 19:19, 55:23, 68:5, 74:3, 116:10</p> <p>extreme [2] - 63:23, 65:2</p> <p>extremely [2] - 111:3, 111:7</p>
F		
<p>face [2] - 67:10, 81:3</p> <p>facets [1] - 29:9</p> <p>fact [49] - 12:4, 16:4, 17:13, 17:15, 20:8, 28:3, 32:13, 33:14, 35:20, 38:2, 38:17, 39:7, 44:22, 45:25, 46:8, 46:21, 50:18, 64:23, 65:2, 65:24, 66:13, 68:15, 74:12, 76:3, 80:25, 82:23, 86:2, 91:3, 91:6, 95:14, 95:19, 101:1, 101:16, 106:6, 106:15, 106:23, 107:12, 107:22, 108:5, 108:14, 108:21, 109:24, 110:1, 110:11, 110:14, 113:24, 118:12, 120:16, 120:23</p> <p>fact-finder [1] - 46:21</p> <p>factor [1] - 106:13</p> <p>factors [2] - 9:15, 36:2</p> <p>facts [4] - 88:8, 102:20, 102:21, 108:13</p> <p>factual [2] - 25:6, 27:16</p> <p>factually [1] - 83:3</p> <p>fail [3] - 39:12, 86:1, 103:9</p> <p>failed [5] - 5:11, 5:15, 22:11, 48:25</p> <p>fails [2] - 64:14, 114:3</p> <p>failure [9] - 7:9, 7:12, 9:19, 55:25, 80:19, 91:13, 95:5, 103:11</p>		

<p>fairly [2] - 71:14, 119:5 fairness [1] - 66:23 fall [1] - 97:16 falls [1] - 65:22 familiar [4] - 33:1, 76:15, 111:21, 119:3 familiarity [3] - 64:13, 66:14, 105:23 family [1] - 103:22 far [9] - 8:8, 57:21, 58:23, 62:21, 79:12, 80:4, 87:2, 114:18, 117:11 farfetched [1] - 57:24 fashion [1] - 70:4 fast [1] - 73:7 fault [1] - 103:15 faulted [1] - 96:8 favor [2] - 47:8, 64:25 favorable [2] - 95:10, 102:21 feature [1] - 57:12 February [1] - 103:13 Fed.3d [1] - 77:24 federal [4] - 5:1, 29:13, 78:17, 79:20 Federal [3] - 9:20, 9:25, 10:1 fees [3] - 47:10, 47:11, 110:4 fellow [3] - 47:2, 64:11, 117:7 felt [3] - 17:12, 69:18 few [10] - 8:11, 17:25, 32:3, 42:10, 46:15, 57:10, 62:13, 70:18, 71:2, 96:22 fiat [1] - 43:13 fiduciaries [12] - 5:10, 6:6, 10:17, 49:8, 57:14, 60:8, 73:16, 86:11, 97:22, 104:15, 113:1, 120:2 fiduciaries' [1] - 91:15 fiduciary [25] - 9:10, 9:19, 10:2, 10:10, 11:1, 32:16, 32:23, 36:20, 37:12, 46:14, 48:15, 48:20, 49:18, 56:1, 56:3, 70:6, 74:14, 74:15, 74:16, 75:6, 89:13, 91:20, 98:13, 98:18, 107:9 fiduciary's [3] - 9:12, 19:12, 21:2 field [1] - 109:21 fighting [1] - 16:17 figure [1] - 106:6 figures [1] - 42:14 file [1] - 20:19 filed [6] - 3:7, 4:15, 5:9, 13:20, 16:12, 30:2 files [1] - 88:5 filing [2] - 46:2, 98:2 filtered [1] - 63:17 final [3] - 11:6, 27:2, 97:18 finalists [2] - 86:23, 86:24 finally [7] - 6:5, 15:11, 16:7, 21:8, 76:4, 94:2, 95:22 financial [14] - 14:20, 52:16, 59:5, 61:13, 62:25, 63:19, 64:2, 64:13, 66:14, 74:18, 76:7, 78:8, 82:18, 86:19 finder [1] - 46:21 findings [1] - 27:9 finish [1] - 50:11 FINRA [4] - 9:16, 11:18, 79:21, 104:3</p>	<p>FINRA's [3] - 99:23, 100:21, 100:22 fired [1] - 116:8 firm [6] - 3:11, 3:14, 4:4, 13:12, 99:13, 115:19 firms [1] - 86:19 first [43] - 4:13, 4:24, 5:5, 6:15, 7:3, 7:8, 7:23, 8:13, 13:12, 18:11, 29:16, 31:13, 31:18, 35:25, 38:14, 40:12, 48:16, 51:14, 63:9, 67:25, 81:15, 81:22, 89:11, 89:16, 90:3, 90:7, 90:22, 91:16, 91:25, 92:8, 94:24, 94:25, 97:25, 98:13, 103:5, 105:9, 105:10, 105:18, 105:20, 108:8, 109:4, 111:9, 112:22 fit [3] - 106:2, 106:4, 108:13 five [3] - 31:3, 101:17, 105:11 fixed [15] - 11:9, 30:15, 33:12, 60:16, 61:23, 68:9, 78:20, 87:16, 102:14, 102:18, 106:5, 106:6, 108:2 flag [1] - 100:24 flaw [1] - 112:14 flawed [1] - 43:7 flaws [1] - 11:7 flexibility [1] - 29:17 flip [1] - 42:15 float [1] - 97:4 floats [1] - 106:14 fluent [3] - 14:1, 14:2, 14:5 focus [3] - 25:1, 25:13, 118:12 focusing [2] - 25:18, 43:17 follow [1] - 32:9 following [7] - 4:11, 6:11, 72:22, 93:11, 99:12, 116:16, 117:23 follows [2] - 70:19, 99:19 footing [2] - 120:1, 120:5 Footnote [1] - 11:13 footnote [1] - 103:8 FOR [4] - 1:1, 2:5, 2:9, 2:14 force [3] - 53:11, 57:16, 58:4 foregoing [2] - 102:19, 122:12 forget [1] - 70:21 forgive [1] - 112:6 Form [2] - 10:13, 10:14 form [2] - 47:10, 56:2 formal [1] - 96:8 formerly [1] - 94:8 forms [1] - 113:11 formula [1] - 112:19 forth [16] - 8:2, 31:19, 32:3, 53:19, 56:3, 60:23, 79:3, 83:10, 83:11, 83:13, 84:18, 85:2, 95:19, 102:6, 104:5, 122:13 forum [1] - 16:4 forward [14] - 29:12, 36:11, 36:12, 39:14, 39:17, 44:17, 46:8, 50:15, 53:24, 78:6, 82:10, 84:16, 105:16 four [14] - 8:1, 8:20, 15:17, 23:1, 23:12, 29:9, 50:12, 50:13, 50:23, 61:8, 64:20, 64:22, 121:11 four-part [1] - 15:17</p>	<p>fourth [2] - 7:18, 19:19 fractional [1] - 52:20 frame [1] - 33:10 frankly [5] - 11:10, 13:17, 20:16, 21:17, 69:17 fraud [1] - 61:17 frummer [1] - 97:21 FSC [30] - 3:17, 3:22, 5:12, 8:18, 8:24, 10:10, 10:11, 10:13, 11:17, 11:22, 12:5, 13:18, 20:13, 24:22, 25:3, 37:5, 80:2, 86:24, 87:18, 92:2, 98:14, 98:15, 98:16, 99:16, 99:24, 101:10, 104:6, 104:12, 118:13 FSC's [5] - 7:12, 10:25, 12:18, 100:1, 100:21 FSC/SUNAMERICA [1] - 2:9 FSC/Wharton [1] - 32:10 FSC/Wharton's [2] - 85:6, 103:19 full [6] - 28:2, 28:15, 30:25, 31:11, 46:24, 87:8 fully [2] - 42:5, 49:15 function [7] - 21:12, 36:5, 70:12, 70:13, 70:25, 71:1, 71:18 Fund [1] - 12:19 fund [17] - 23:16, 44:1, 44:2, 44:23, 45:12, 61:25, 68:19, 68:20, 75:9, 75:14, 75:15, 75:18, 75:19, 75:20, 109:22, 115:25, 117:16 fundamental [3] - 14:10, 42:8, 61:14 funded [1] - 52:6 funding [3] - 83:8, 92:24, 116:14 Funds [3] - 5:18, 7:15, 15:9 funds [16] - 5:25, 6:2, 10:1, 40:6, 54:11, 55:2, 65:24, 66:3, 82:20, 103:24, 107:14, 113:1, 115:22, 116:1, 116:4 furnace [1] - 51:22 future [5] - 39:10, 46:8, 53:4, 63:2, 65:12 futures [1] - 65:4</p>
G		
<p>gain [3] - 37:22, 44:18, 45:25 gained [3] - 50:14, 50:22, 64:21 gains [4] - 59:7, 114:2, 114:3, 114:21 garnered [1] - 37:9 gather [1] - 48:5 general [4] - 5:9, 7:24, 63:19, 96:12 generally [3] - 43:6, 109:22, 120:20 generate [1] - 26:19 GENTILE [24] - 2:11, 3:23, 51:12, 57:1, 57:15, 57:25, 58:18, 58:21, 58:23, 59:21, 60:11, 61:5, 64:7, 80:18, 80:22, 81:6, 81:8, 83:24, 84:10, 86:8, 88:19, 103:3, 103:5, 104:17 Gentile [5] - 3:23, 25:11, 31:11, 51:8, 51:11 genuine [1] - 102:20 Georgia [1] - 2:9</p>		

<p>GERALD ^[1] - 1:4 GERRY ^[1] - 1:15 given ^[13] - 7:19, 8:18, 16:4, 24:22, 29:11, 31:6, 60:22, 64:24, 69:12, 69:17, 76:1, 89:5, 119:9 GIW ^[4] - 9:18, 79:16, 108:22 goal ^[10] - 14:22, 52:25, 69:21, 69:23, 78:16, 78:19, 79:16, 118:9, 118:14, 120:7 goals ^[4] - 47:17, 47:18, 69:20, 117:13 GOLDENBERG ^[1] - 1:3 Goldenberg ^[26] - 3:3, 13:13, 13:14, 13:17, 14:1, 14:8, 39:8, 40:24, 47:21, 50:8, 54:16, 54:23, 59:2, 62:7, 62:11, 62:16, 62:22, 63:8, 63:14, 63:18, 63:22, 64:14, 76:6, 89:18, 114:13 Goldenberg's ^[3] - 39:11, 61:1, 82:24 govern ^[1] - 84:18 governed ^[3] - 83:22, 91:2, 91:18 governs ^[1] - 85:4 grandchildren ^[1] - 62:17 granted ^[1] - 47:7 grave ^[1] - 35:17 great ^[1] - 96:18 greater ^[1] - 18:20 greatest ^[1] - 39:19 Greer ^[1] - 115:20 grievances ^[2] - 66:14, 67:4 group ^[11] - 23:16, 36:8, 38:3, 41:25, 42:6, 42:12, 42:23, 50:20, 55:25, 112:13, 118:24 Group ^[25] - 3:19, 25:4, 30:19, 31:3, 33:16, 34:16, 86:24, 87:18, 87:23, 88:1, 88:6, 91:11, 92:7, 92:9, 92:25, 93:5, 93:9, 93:22, 94:4, 99:2, 100:23, 102:5, 102:16, 104:6, 104:12 Group's ^[1] - 99:2 Groussman ^[2] - 38:20, 43:18 Grovers ^[1] - 2:4 grow ^[1] - 73:6 growing ^[2] - 53:2, 75:9 guarantee ^[1] - 58:9 guaranteed ^[2] - 46:23 guarantees ^[1] - 97:8 guess ^[7] - 28:16, 34:4, 35:12, 57:15, 58:1, 61:22, 96:15 guessing ^[1] - 78:7 guide ^[1] - 84:25 guidelines ^[3] - 86:6, 92:4, 92:22 Guidelines ^[1] - 95:8 guise ^[1] - 56:6 guy ^[1] - 61:19 gyration ^[1] - 49:20 gyrations ^[1] - 48:6</p>	<p>handful ^[1] - 19:24 handle ^[1] - 121:9 happy ^[1] - 28:14 harbor ^[2] - 9:23, 107:13 harbors ^[1] - 9:21 hard ^[1] - 79:10 hardship ^[1] - 66:3 harkened ^[1] - 26:2 harm ^[7] - 37:18, 37:22, 37:23, 38:1, 43:5, 43:6 harmed ^[6] - 41:7, 43:14, 43:20, 45:4, 45:19, 51:4 harming ^[1] - 45:20 harms ^[4] - 44:4, 48:9, 50:24 harness ^[1] - 57:18 head ^[3] - 67:7, 77:3, 115:18 hear ^[3] - 4:10, 22:6, 72:3 heard ^[3] - 16:14, 115:9, 120:13 heavily ^[2] - 36:21, 48:3 held ^[14] - 5:22, 12:23, 14:4, 14:14, 15:2, 15:11, 22:12, 31:3, 51:20, 52:13, 72:14, 76:10, 117:8 help ^[3] - 38:10, 111:12, 111:14 helpful ^[1] - 112:8 Hembrough ^[11] - 8:15, 10:16, 30:18, 87:22, 89:1, 98:17, 101:4, 101:13, 101:22, 103:20, 116:12 Hembrough's ^[2] - 100:11, 101:9 Henry ^[2] - 51:20, 103:21 Herculean ^[1] - 35:17 hereafter ^[1] - 99:12 hereby ^[1] - 122:12 hereinbefore ^[1] - 122:13 hereof ^[1] - 81:24 Hewitt ^[3] - 87:14, 107:23 high ^[3] - 23:10, 71:3, 117:8 higher ^[2] - 31:24, 53:6 highlights ^[1] - 38:3 highly ^[1] - 14:11 himself ^[4] - 50:8, 106:21, 115:1, 118:25 hindsight ^[9] - 33:4, 35:11, 37:10, 47:15, 49:2, 61:7, 61:9, 61:21, 114:15 HINSON ^[4] - 2:8, 3:21, 115:9, 115:12 Hinson ^[1] - 3:21 hint ^[1] - 106:9 hired ^[2] - 78:20, 116:7 hires ^[2] - 75:21, 111:13 hiring ^[1] - 104:16 historic ^[3] - 60:25, 61:13 historical ^[1] - 48:3 historically ^[4] - 31:25, 53:7, 82:15, 84:12 history ^[4] - 19:11, 101:6, 101:7, 104:5 hit ^[2] - 22:25, 54:8 Holbrook ^[2] - 117:5, 117:6 hold ^[2] - 14:12, 87:11 holding ^[4] - 6:25, 69:12, 77:3, 93:14 holds ^[2] - 14:6, 84:5 home ^[1] - 22:25</p>	<p>Honor ^[118] - 3:10, 3:13, 3:16, 3:21, 3:23, 4:4, 4:7, 4:18, 4:21, 12:16, 13:3, 13:5, 13:9, 14:11, 16:11, 16:20, 17:24, 18:4, 21:16, 22:6, 22:21, 24:15, 24:17, 27:24, 29:22, 30:9, 30:24, 33:5, 36:15, 37:20, 39:22, 43:11, 49:22, 51:8, 51:12, 51:13, 55:7, 56:7, 56:12, 57:1, 57:10, 57:15, 57:25, 58:21, 59:15, 60:11, 61:5, 64:7, 67:5, 67:11, 67:16, 67:17, 67:20, 68:13, 69:4, 69:5, 69:6, 69:19, 72:3, 72:11, 73:21, 75:16, 76:4, 77:22, 78:2, 78:10, 79:9, 79:22, 80:8, 80:18, 80:22, 84:11, 85:8, 86:1, 88:19, 89:9, 89:11, 90:25, 92:17, 93:12, 93:21, 94:2, 94:14, 94:17, 94:20, 94:22, 95:7, 95:12, 95:13, 95:22, 96:5, 96:15, 97:6, 97:15, 97:18, 98:8, 98:25, 102:2, 102:19, 102:23, 103:3, 103:17, 104:10, 104:13, 104:17, 105:1, 105:4, 106:5, 111:11, 115:9, 115:12, 115:14, 117:11, 119:5, 121:3, 121:4, 121:7 HONORABLE ^[1] - 1:19 hope ^[1] - 97:4 horizon ^[4] - 47:18, 53:10, 58:2 host ^[1] - 10:20 human ^[1] - 62:10 hunt ^[1] - 65:14 Hydrogen ^[3] - 6:17, 27:7, 69:13 hypothetical ^[3] - 106:7, 106:20, 117:23</p> <p style="text-align: center;">I</p> <p>I.R.S ^[1] - 10:14 idea ^[6] - 53:5, 60:24, 81:25, 107:20, 112:6 identical ^[2] - 70:2, 117:19 identify ^[1] - 60:9 ignore ^[3] - 30:16, 38:17, 39:25 ignored ^[1] - 24:11 illustrating ^[1] - 67:23 imaginary ^[1] - 56:21 imagine ^[3] - 57:16, 86:12, 86:15 impact ^[4] - 21:11, 31:6, 114:19, 120:9 impacted ^[1] - 7:16 impeached ^[1] - 66:21 impetus ^[2] - 88:10 implausible ^[1] - 79:12 implement ^[1] - 37:5 implementation ^[1] - 20:2 implemented ^[3] - 6:10, 32:10, 32:13 implementing ^[1] - 95:17 implicate ^[2] - 8:1, 56:3 implicates ^[3] - 7:5, 7:21, 7:24 implication ^[1] - 7:25 implications ^[3] - 7:10, 7:14, 7:17 implies ^[1] - 91:7 importance ^[3] - 9:17, 91:24, 92:5 important ^[13] - 9:14, 9:15, 25:5, 25:21, 26:21, 29:25, 31:15, 54:24, 75:17,</p>
H		
<p>half ^[4] - 28:1, 28:25, 42:12, 43:14 hand ^[3] - 29:25, 59:24</p>		

<p>75:19, 77:9, 78:5, 117:21 importantly [1] - 26:17 impose [6] - 36:10, 40:1, 45:2, 47:25, 56:7, 65:8 imposes [1] - 98:14 imposing [1] - 43:13 impossible [1] - 118:13 impractical [1] - 93:24 improper [3] - 77:19, 79:24, 120:24 imprudent [2] - 36:21, 114:17 in-depth [1] - 100:20 inaccurate [1] - 71:19 inadequate [6] - 27:5, 48:24, 51:7, 63:8, 64:11, 87:24 inappropriate [6] - 31:21, 42:24, 47:22, 48:24, 50:10, 76:8 inartful [1] - 77:22 inasmuch [1] - 70:7 INC [2] - 1:10, 1:11 Inc [1] - 3:3 incentive [2] - 14:17, 67:3 incentives [1] - 66:25 incentivized [1] - 15:22 inception [3] - 81:16, 85:6, 90:4 incidentally [1] - 19:3 inclined [1] - 7:25 include [3] - 25:24, 81:2, 117:4 included [4] - 11:23, 27:5, 30:20, 30:22 including [6] - 3:5, 3:25, 27:18, 52:15, 54:18, 99:14 income [12] - 11:9, 30:15, 33:12, 60:16, 61:23, 65:25, 66:11, 68:9, 78:21, 102:14, 102:18 incompatibility [1] - 23:14 incompatible [8] - 15:1, 15:8, 15:13, 22:5, 22:7, 22:11, 23:9, 26:5 incongruous [1] - 56:17 inconsistent [7] - 14:13, 14:25, 15:8, 26:8, 68:18, 69:3, 107:5 incorporate [1] - 85:24 incorporated [1] - 84:15 incorrect [1] - 70:17 increase [1] - 61:10 increasing [1] - 56:25 incredibly [1] - 35:18 incumbent [1] - 17:12 incur [1] - 94:24 incurred [1] - 29:5 indeed [9] - 26:1, 27:1, 27:10, 27:11, 28:14, 29:25, 35:4, 35:22, 40:3 indefinite [1] - 53:3 INDEL [1] - 1:10 Indel [10] - 3:3, 8:18, 12:2, 12:7, 13:17, 20:13, 25:12, 39:9, 64:23, 98:12 Indel's [2] - 5:12, 7:11 independent [1] - 103:9 independently [1] - 114:5 indicate [2] - 11:14, 78:18 indicated [4] - 69:10, 69:24, 77:14,</p>	<p>77:16 indicates [1] - 10:11 indicating [2] - 13:14, 13:20 indicator [1] - 117:22 indifferent [2] - 76:20, 76:21 individual [39] - 3:25, 9:7, 12:2, 12:25, 15:22, 16:18, 16:21, 18:15, 21:4, 26:1, 39:4, 39:11, 39:13, 40:13, 41:1, 41:11, 41:20, 41:23, 45:9, 47:19, 48:23, 50:5, 50:7, 50:13, 52:18, 53:10, 53:12, 55:12, 55:13, 56:16, 57:8, 59:18, 62:3, 72:23, 76:18, 80:1, 112:18, 113:7, 113:8 INDIVIDUAL [1] - 2:15 individual's [3] - 43:19, 50:4, 53:11 individualized [5] - 19:23, 38:25, 39:2, 40:23, 46:24 individually [3] - 1:10, 15:19, 55:14 individuals [17] - 15:21, 41:17, 41:18, 44:5, 45:13, 45:25, 50:9, 52:20, 54:1, 72:14, 98:20, 103:20, 112:11, 118:23, 119:9, 119:11, 119:12 individuals' [1] - 101:18 induction [1] - 51:22 Inductotherm [21] - 3:6, 3:24, 4:5, 4:9, 4:14, 8:23, 30:14, 51:15, 51:19, 52:5, 53:14, 53:24, 54:1, 54:17, 62:10, 64:19, 65:3, 65:18, 81:19, 85:19, 90:13 INDUCTOTHERM [4] - 1:6, 1:10, 1:11, 2:14 Industries [1] - 9:18 INDUSTRIES [2] - 1:10, 2:14 industry [1] - 57:19 inequitable [1] - 50:23 inevitably [1] - 74:2 infer [1] - 88:20 inferable [1] - 88:15 inference [3] - 88:11, 88:20, 89:3 inferences [3] - 88:17, 95:10, 97:13 inferential [1] - 120:12 infinite [1] - 39:7 inflexible [2] - 43:7, 73:16 information [31] - 8:16, 8:22, 9:3, 30:22, 39:4, 42:5, 48:4, 48:25, 57:1, 57:11, 68:18, 68:23, 72:6, 74:16, 74:17, 75:2, 75:4, 76:1, 88:18, 88:24, 92:23, 99:12, 99:13, 99:23, 100:10, 102:9, 102:10, 106:11, 113:17, 113:18 informed [2] - 28:17, 49:15 informs [1] - 11:3 infractions [2] - 87:22, 104:4 initiated [1] - 93:17 initiation [2] - 93:20, 102:15 injury [3] - 26:15, 50:18, 64:22 inquired [3] - 69:6, 72:11, 77:22 inquiry [5] - 21:18, 27:1, 69:17, 74:24, 82:24 inscribed [1] - 28:22 insisted [1] - 19:25</p>	<p>insofar [6] - 4:25, 7:25, 70:9, 72:15, 76:22, 120:14 instance [5] - 19:17, 22:9, 74:7, 109:10, 112:1 instructed [2] - 12:7, 77:20 instructs [1] - 27:8 instrument [1] - 60:22 instruments [2] - 60:16, 83:14 integrate [1] - 98:5 integrated [9] - 81:17, 82:3, 83:1, 89:25, 90:2, 90:5, 90:7, 97:20, 98:4 integrating [1] - 90:17 intelligent [1] - 14:16 intended [1] - 63:25 intensive [1] - 17:11 intentionally [1] - 54:10 interclass [2] - 25:9, 51:6 interest [7] - 15:18, 26:24, 27:4, 48:17, 52:23, 65:14, 77:12 interested [4] - 29:13, 62:24, 119:5, 119:7 interesting [2] - 65:16, 116:15 interests [6] - 19:15, 20:1, 39:13, 50:9, 50:24, 116:24 interfacing [1] - 63:14 Internal [3] - 82:4, 82:5, 82:6 Internet [1] - 87:20 interpret [1] - 85:21 interpretation [6] - 85:18, 91:15, 95:23, 97:19, 97:23, 97:24 interrupt [1] - 95:24 interviewed [1] - 99:1 introduce [2] - 3:18, 3:25 inured [1] - 92:1 invalid [2] - 31:21, 49:19 invest [12] - 5:18, 10:12, 36:4, 54:11, 54:15, 66:6, 72:23, 109:24, 112:12, 112:19, 113:1, 116:2 invested [17] - 5:25, 34:10, 35:6, 36:21, 44:6, 48:3, 49:2, 52:15, 61:7, 66:5, 66:7, 84:6, 102:14, 102:15, 107:15, 108:23, 118:7 investigate [1] - 104:7 investigating [1] - 99:4 investigation [16] - 7:12, 12:18, 26:23, 86:9, 86:13, 86:14, 87:25, 88:2, 98:13, 98:15, 98:25, 100:8, 103:17, 103:18, 104:9, 104:11 investing [2] - 31:25, 105:13 investment [81] - 3:19, 5:23, 6:8, 9:21, 10:10, 10:12, 10:14, 10:15, 10:20, 11:4, 11:14, 12:19, 15:9, 19:13, 19:21, 19:23, 19:25, 20:3, 20:11, 20:21, 31:19, 31:21, 32:1, 32:8, 32:19, 32:21, 33:9, 34:9, 36:3, 37:1, 37:6, 38:19, 41:16, 42:7, 47:15, 49:9, 49:23, 50:5, 55:25, 56:7, 60:18, 60:19, 62:1, 65:2, 67:17, 74:13, 81:12, 82:22, 84:2, 84:22, 85:6, 85:7, 85:13, 86:5, 86:18, 86:21, 87:2, 87:9, 87:13, 87:15, 91:1,</p>
---	---	---

<p>91:18, 92:4, 92:21, 93:12, 95:8, 95:17, 101:22, 101:25, 102:5, 105:14, 107:9, 107:24, 109:21, 111:16, 112:11, 116:6, 116:8, 116:9, 116:18, 119:13</p> <p>Investment [32] - 30:14, 31:1, 31:14, 31:18, 32:5, 32:12, 33:7, 52:25, 53:4, 54:13, 66:7, 68:4, 68:8, 69:20, 85:3, 85:24, 91:11, 92:7, 92:9, 92:25, 93:5, 93:10, 93:17, 93:18, 93:19, 93:21, 93:22, 94:4, 94:9, 101:25, 102:16, 106:15</p> <p>investments [30] - 19:23, 33:17, 34:15, 43:21, 46:8, 48:21, 48:22, 52:12, 52:20, 58:6, 61:23, 61:24, 64:25, 72:19, 73:10, 83:22, 84:19, 85:11, 92:2, 92:4, 92:15, 93:4, 93:7, 101:15, 103:21, 106:17, 113:8, 115:2, 118:5</p> <p>invite [1] - 35:12</p> <p>inviting [1] - 26:8</p> <p>invoke [2] - 36:16</p> <p>involved [3] - 13:23, 117:12</p> <p>involvement [1] - 63:16</p> <p>involving [1] - 38:25</p> <p>IRA [1] - 56:15</p> <p>irrelevant [2] - 71:7, 71:8</p> <p>issue [24] - 5:14, 9:5, 18:12, 20:20, 26:2, 41:14, 43:21, 47:12, 61:14, 76:10, 80:15, 85:15, 95:11, 105:23, 108:17, 110:13, 110:14, 110:22, 113:9, 114:7, 115:10, 118:16, 120:5, 120:22</p> <p>issued [2] - 96:23, 107:5</p> <p>issues [22] - 4:23, 5:19, 6:6, 8:5, 16:22, 16:25, 17:1, 21:17, 26:11, 38:25, 39:2, 45:8, 45:9, 46:24, 47:3, 47:4, 51:9, 51:16, 66:18, 77:18, 115:15</p> <p>Item [2] - 121:12, 121:13</p> <p>iterations [1] - 82:17</p> <p>itself [13] - 23:1, 56:24, 58:20, 59:20, 70:11, 71:1, 75:19, 75:20, 85:1, 88:20, 99:13, 105:9, 106:12</p>	<p>95:20, 96:1, 97:3, 104:19</p> <p>judgments [1] - 121:14</p> <p>judicial [1] - 43:13</p> <p>jump [1] - 41:9</p> <p>jumps [1] - 46:15</p> <p>jurisprudence [1] - 14:23</p> <p>justice [1] - 24:7</p> <p>justification [1] - 45:22</p>	<p>91:7, 93:11</p> <p>large [9] - 8:25, 9:12, 21:3, 21:5, 56:10, 71:20, 86:19, 92:16, 92:19</p> <p>largely [2] - 8:5, 58:5</p> <p>last [6] - 32:3, 57:10, 67:15, 74:12, 90:8, 98:6</p> <p>late [4] - 61:13, 97:10, 103:22, 121:4</p> <p>launched [1] - 43:7</p> <p>law [28] - 3:11, 3:14, 4:24, 6:11, 14:13, 14:19, 17:7, 17:9, 25:6, 25:21, 26:12, 26:22, 33:3, 43:16, 59:5, 63:15, 76:7, 76:9, 76:15, 77:11, 79:10, 84:8, 95:19, 107:4, 114:7, 117:25, 119:15</p> <p>Lawrence [1] - 4:1</p> <p>Lawrenceville [1] - 2:5</p> <p>lawsuit [1] - 63:16</p> <p>lawsuits [1] - 46:2</p> <p>lead [3] - 27:15, 47:4, 68:16</p> <p>leading [2] - 29:25, 51:21</p> <p>learned [2] - 88:6, 110:15</p> <p>learning [1] - 116:25</p> <p>least [8] - 23:22, 26:15, 57:5, 57:11, 79:9, 92:22, 96:10, 119:8</p> <p>leave [6] - 53:18, 76:11, 77:1, 77:5, 96:16, 97:9</p> <p>leaves [1] - 81:11</p> <p>leaving [1] - 65:3</p> <p>left [13] - 28:4, 59:10, 59:12, 64:19, 70:18, 71:2, 71:3, 75:24, 75:25, 76:2, 76:22, 87:14</p> <p>legal [4] - 4:25, 27:7, 27:16, 109:8</p> <p>legally [1] - 20:6</p> <p>lengthy [1] - 115:14</p> <p>Leonard [1] - 13:15</p> <p>less [8] - 6:2, 18:7, 45:5, 63:1, 66:4, 73:3, 113:15, 117:11</p> <p>letter [2] - 28:9, 89:18</p> <p>letters [1] - 82:4</p> <p>level [2] - 105:25, 109:17</p> <p>leveled [1] - 60:7</p> <p>levels [1] - 35:24</p> <p>lever [4] - 59:24, 59:25, 60:4, 60:10</p> <p>LEVIN [7] - 2:12, 4:4, 105:4, 109:24, 112:14, 112:21, 115:8</p> <p>Levin [2] - 4:4, 105:5</p> <p>Levy [1] - 13:4</p> <p>liability [7] - 6:7, 6:18, 79:3, 79:13, 98:14, 117:9, 120:5</p> <p>liable [1] - 9:19</p> <p>lickety [1] - 29:19</p> <p>lickety-split [1] - 29:19</p> <p>life [3] - 39:7, 58:10, 59:7</p> <p>lifetime [1] - 60:25</p> <p>light [1] - 102:21</p> <p>likely [7] - 48:9, 64:25, 66:24, 67:10, 68:15, 69:9, 77:12</p> <p>likewise [1] - 47:23</p> <p>limited [5] - 6:19, 21:19, 63:11, 63:19, 113:13</p>
<p style="text-align: center;">J</p> <p>January [7] - 37:5, 37:7, 37:14, 37:18, 37:24, 38:9, 69:1</p> <p>JBS [1] - 1:9</p> <p>JEROME [1] - 1:19</p> <p>Jersey [4] - 2:5, 2:14, 122:11, 122:12</p> <p>JERSEY [2] - 1:1, 1:16</p> <p>job [1] - 49:24</p> <p>JOHN [1] - 1:15</p> <p>Judge [15] - 25:5, 33:3, 33:14, 34:6, 38:14, 40:3, 40:12, 42:18, 48:11, 50:13, 55:5, 55:21, 55:22, 89:17, 103:12</p> <p>judge [4] - 29:13, 31:13, 45:1, 69:10</p> <p>JUDGE [2] - 1:20, 1:20</p> <p>judgment [15] - 3:6, 4:14, 8:6, 46:21, 47:8, 74:15, 80:15, 88:16, 89:3, 95:9,</p>	<p style="text-align: center;">L</p> <p>Labor [7] - 10:2, 107:6, 107:8, 107:14, 112:25, 113:4</p> <p>laborer [1] - 64:12</p> <p>laborers [1] - 14:19</p> <p>lack [2] - 86:8, 88:12</p> <p>lacked [1] - 75:3</p> <p>lacking [1] - 101:21</p> <p>laid [1] - 57:22</p> <p>Lakind [12] - 3:11, 3:12, 3:14, 4:19, 28:4, 35:25, 67:15, 73:8, 89:8, 89:10, 115:13</p> <p>LAKIND [74] - 2:2, 2:3, 2:4, 3:10, 3:13, 4:18, 4:21, 13:9, 16:11, 16:20, 17:17, 17:24, 18:4, 20:5, 20:8, 22:6, 22:10, 22:19, 22:23, 23:2, 23:4, 23:8, 24:1, 24:3, 24:8, 24:13, 24:15, 67:16, 70:17, 72:22, 73:7, 73:9, 73:21, 74:6, 74:19, 74:22, 75:10, 75:16, 75:22, 76:21, 77:9, 78:10, 79:9, 80:8, 89:9, 94:17, 94:20, 94:22, 95:7, 96:5, 96:15, 96:21, 97:6, 97:15, 98:11, 100:6, 100:16, 102:4, 103:1, 105:1, 115:14, 115:23, 116:1, 116:20, 116:22, 117:2, 117:17, 119:1, 119:4, 119:10, 120:4, 121:3, 121:7, 121:15</p> <p>landscape [1] - 26:12</p> <p>language [6] - 81:25, 83:20, 84:3, 91:3,</p>	

<p>line [4] - 33:20, 79:6, 79:10, 111:9 lines [2] - 34:2, 99:13 Lines [1] - 99:18 lining [1] - 46:2 liquid [1] - 58:6 liquidated [1] - 108:23 liquidity [10] - 58:3, 69:22, 108:19, 108:25, 117:22, 117:25, 118:7, 118:14, 119:18, 119:22 LISA [3] - 1:24, 122:10, 122:15 list [3] - 42:2, 86:23, 101:11 listed [1] - 69:20 literature [2] - 107:4, 107:17 litigation [17] - 15:19, 15:20, 15:22, 17:7, 25:2, 25:25, 26:20, 29:5, 37:10, 38:24, 41:15, 89:15, 89:17, 102:16, 107:18, 118:19, 120:10 LLP [1] - 2:10 locked [2] - 59:6, 63:4 lockstep [2] - 113:19 LOEW [1] - 1:4 Loew [11] - 39:8, 47:23, 50:11, 50:22, 59:10, 64:16, 64:18, 64:24, 65:10, 76:16, 77:14 logical [1] - 56:22 Long-Short [4] - 5:18, 7:15, 12:19, 15:9 long-term [7] - 30:16, 32:6, 39:7, 39:25, 48:5, 50:5, 108:23 longest [1] - 51:25 look [19] - 13:16, 29:9, 34:12, 38:16, 42:12, 49:25, 54:14, 59:1, 72:16, 74:25, 98:19, 106:15, 106:25, 107:2, 107:23, 109:6, 109:9, 113:2, 117:10 looked [4] - 36:6, 60:5, 100:15, 112:2 looking [3] - 50:6, 53:24, 78:7 looks [2] - 34:3, 119:25 lose [2] - 46:17, 65:5 losers [1] - 50:21 loss [8] - 37:22, 47:10, 68:6, 68:10, 91:13, 94:24, 95:5, 97:17 losses [11] - 9:12, 12:4, 21:3, 21:6, 42:21, 45:5, 63:4, 92:16, 92:19, 114:4, 114:21 lost [2] - 44:5, 114:17 lottery [3] - 48:14, 48:16, 48:17 low [1] - 71:4 Lucy [6] - 9:14, 21:8, 41:10, 43:10, 104:21, 121:9</p>	<p>55:20, 56:9, 60:4, 61:20, 63:2, 65:5, 65:12, 94:8, 99:3, 101:17, 109:22 management [10] - 16:7, 16:8, 32:13, 32:14, 33:8, 35:16, 36:24, 60:13, 116:7, 116:8 manager [4] - 10:15, 30:21, 62:10, 87:14 managers [4] - 32:8, 35:2, 61:25, 101:18 managing [9] - 98:16, 98:21, 100:11, 100:18, 101:14, 101:19, 103:20, 103:24, 115:21 mandate [2] - 58:14, 83:4 mandated [2] - 20:18, 65:21 mandatory [3] - 53:25, 58:16, 62:8 manifestation [1] - 83:19 manifested [1] - 87:11 manner [3] - 6:1, 13:1, 54:11 Manning [1] - 4:1 mantle [1] - 31:10 manufactured [1] - 13:13 manufacturers [2] - 57:18 Marc [1] - 99:24 March [7] - 11:17, 35:20, 68:2, 71:9, 71:10, 71:14, 102:13 Marcus [1] - 122:14 MARCUS [3] - 1:24, 122:10, 122:15 mark [1] - 33:5 markedly [1] - 63:3 market [31] - 33:20, 34:16, 34:18, 35:1, 35:5, 35:7, 35:9, 35:19, 36:1, 36:18, 36:20, 39:18, 48:6, 49:17, 49:20, 53:7, 59:3, 60:6, 60:18, 60:25, 61:6, 61:13, 62:11, 62:21, 64:6, 71:3, 74:7, 74:10, 78:12, 78:23, 118:22 markets [3] - 33:17, 62:14, 74:18 Mart [3] - 23:23, 25:20, 25:23 MASTER [1] - 1:6 Master [1] - 90:14 material [3] - 80:25, 102:20, 105:14 materials [4] - 31:2, 32:17, 87:8, 87:20 mathematically [1] - 34:4 mathematician [1] - 110:2 mathematics [3] - 110:3, 110:11, 110:20 matter [12] - 28:12, 33:3, 39:17, 49:17, 66:23, 74:12, 84:8, 94:2, 110:12, 110:14, 122:13 matters [7] - 26:17, 33:1, 63:19, 64:2, 64:14, 66:14, 67:1 Matthew [1] - 4:7 MATTHEW [1] - 2:13 maximize [2] - 14:17, 67:1 maximizes [1] - 41:2 maximizing [3] - 60:5, 62:25, 65:15 maximum [1] - 52:7 McDowell [1] - 70:5 McMahon [1] - 70:5 McShane [1] - 82:23</p>	<p>McShane's [1] - 57:2 mean [18] - 22:11, 22:25, 23:25, 29:8, 34:7, 34:25, 35:1, 43:25, 74:11, 74:13, 74:24, 79:5, 79:22, 83:25, 109:25, 111:6, 112:14, 114:6 meaning [2] - 90:23, 102:14 means [6] - 26:3, 28:24, 44:1, 86:13, 88:2, 89:4 meant [4] - 53:13, 88:23, 89:6, 113:5 measurable [1] - 120:18 measure [4] - 6:25, 109:7, 109:9, 120:21 measured [3] - 10:9, 16:9, 37:22 measures [1] - 9:10 medical [4] - 66:2, 77:18 meet [4] - 22:11, 22:14, 24:9, 48:25 meeting [9] - 13:21, 30:22, 31:1, 33:15, 35:4, 35:14, 87:12, 109:1, 120:2 meetings [5] - 31:2, 32:19, 34:14, 86:20, 87:7 meets [1] - 12:21 meltdown [1] - 61:13 member [6] - 23:21, 50:19, 51:4, 70:18, 71:6, 71:18 members [30] - 6:21, 7:4, 15:18, 18:1, 18:6, 23:24, 26:9, 26:14, 27:2, 41:6, 41:7, 42:11, 44:15, 46:5, 47:13, 50:25, 51:3, 55:13, 63:3, 63:25, 70:15, 70:25, 71:11, 71:20, 72:12, 72:16, 72:21, 76:18, 78:24 mention [5] - 30:20, 55:3, 76:3, 88:15, 110:7 mentioned [2] - 40:22, 78:2 mere [1] - 30:11 merely [3] - 27:9, 27:12, 35:15 merits [23] - 4:25, 5:6, 5:7, 5:13, 5:23, 6:15, 6:17, 8:7, 17:18, 21:17, 25:2, 27:18, 28:5, 29:21, 31:15, 44:20, 46:18, 67:22, 68:21, 94:5, 94:7, 96:6, 96:24 Messrs [1] - 8:15 met [4] - 22:1, 32:16, 37:16, 74:20 method [15] - 6:24, 7:1, 46:12, 106:4, 110:1, 110:5, 110:7, 113:6, 113:7, 113:14, 114:6, 114:8, 114:10, 114:25 methodological [1] - 113:9 methodologically [2] - 112:20, 112:21 methodology [25] - 11:19, 11:24, 12:8, 21:20, 21:21, 72:3, 72:6, 72:8, 72:9, 106:1, 106:3, 106:12, 106:19, 106:25, 107:16, 108:12, 113:11, 113:21, 114:2, 117:16, 117:24, 119:14, 119:16, 119:21, 119:25 methods [1] - 86:11 metric [1] - 119:10 might [13] - 5:5, 12:9, 17:24, 21:9, 36:3, 45:25, 57:20, 67:20, 71:11, 74:8, 88:9, 100:24, 117:22 mild [3] - 81:4, 81:6, 81:8 Mill [1] - 2:4 million [6] - 69:3, 70:22, 70:23, 71:5,</p>
M		
<p>magistrate [1] - 69:10 makers [1] - 28:9 man [1] - 32:25 manage [8] - 37:1, 56:19, 56:20, 75:18, 86:22, 87:10, 99:5, 100:7 manageable [1] - 16:16 managed [20] - 22:9, 39:20, 39:24, 52:3, 52:11, 53:19, 54:2, 54:25, 55:14,</p>		

<p>100:8 mind [2] - 12:9, 97:12 minimal [1] - 15:24 minimize [1] - 92:16 minus [4] - 36:9, 119:4, 119:7, 119:10 minute [1] - 103:4 minutes [9] - 8:11, 17:25, 30:23, 35:15, 54:8, 99:1, 100:25, 108:18, 109:1 misconduct [1] - 7:8 misinterpreting [2] - 99:9, 99:15 miss [1] - 33:5 mitigation [1] - 6:3 mix [1] - 72:18 model [13] - 6:8, 6:10, 12:2, 60:13, 60:21, 71:14, 87:2, 120:8, 120:9, 120:11, 120:12, 120:23, 120:25 models [2] - 48:2, 61:8 moderate [1] - 11:18 moment [3] - 42:20, 51:9, 78:4 money [37] - 12:6, 15:13, 21:14, 41:3, 41:13, 44:1, 44:5, 44:23, 45:6, 45:13, 46:25, 47:1, 48:14, 49:2, 50:20, 50:22, 54:15, 58:17, 58:25, 59:3, 59:4, 59:16, 65:5, 77:17, 79:19, 101:18, 108:20, 113:15, 113:16, 114:16, 114:17, 116:3, 118:7, 118:8 moneys [1] - 52:14 month [11] - 11:20, 33:14, 33:16, 34:9, 35:13, 49:9, 60:1, 60:10, 74:20, 108:21, 121:20 monthly [9] - 10:20, 12:4, 30:22, 31:1, 32:16, 32:18, 34:14, 35:14, 87:12 months [8] - 50:13, 50:23, 62:13, 64:20, 64:22, 96:22 moreover [1] - 85:25 Morgan [1] - 115:20 morning [1] - 40:4 most [27] - 5:25, 17:19, 17:20, 20:22, 22:16, 22:19, 22:20, 25:18, 26:3, 26:17, 27:5, 37:3, 46:5, 46:6, 63:3, 63:12, 63:18, 65:16, 66:10, 77:25, 86:19, 95:10, 102:21, 114:6, 114:8, 116:21 mostly [1] - 101:18 motion [44] - 3:5, 3:6, 4:13, 4:20, 4:23, 5:8, 8:6, 8:7, 16:13, 16:17, 17:5, 17:6, 28:24, 29:1, 29:24, 30:1, 30:11, 30:25, 55:4, 55:8, 57:4, 66:17, 80:22, 80:23, 81:1, 81:22, 88:4, 88:16, 89:3, 89:20, 90:3, 95:9, 95:20, 96:6, 96:25, 97:14, 98:2, 98:4, 104:20, 104:21, 105:6, 121:8, 121:13 motions [15] - 3:5, 3:7, 4:11, 4:12, 4:15, 28:8, 29:16, 29:21, 55:8, 80:12, 80:15, 95:25, 104:19, 121:12, 121:16 motivations [1] - 66:22 Motorola [1] - 38:20 move [5] - 8:4, 13:6, 80:10, 98:9, 98:10 moved [1] - 22:4 moving [1] - 97:17</p>	<p>MR [136] - 3:10, 3:13, 3:16, 3:21, 3:23, 4:4, 4:7, 4:18, 4:21, 13:9, 16:11, 16:20, 17:17, 17:24, 18:4, 20:5, 20:8, 22:6, 22:10, 22:19, 22:23, 23:2, 23:4, 23:8, 24:1, 24:3, 24:8, 24:13, 24:15, 24:17, 24:19, 25:16, 28:3, 28:11, 29:4, 29:22, 34:6, 34:12, 34:23, 34:25, 35:22, 37:17, 37:20, 37:25, 38:10, 39:22, 41:5, 42:16, 42:18, 43:11, 44:4, 44:11, 45:1, 45:18, 46:6, 46:19, 46:22, 49:12, 49:14, 50:2, 51:12, 57:1, 57:15, 57:25, 58:18, 58:21, 58:23, 59:21, 60:11, 61:5, 64:7, 67:16, 70:17, 72:22, 73:7, 73:9, 73:21, 74:6, 74:19, 74:22, 75:10, 75:16, 75:22, 76:21, 77:9, 78:10, 79:9, 80:8, 80:18, 80:22, 81:6, 81:8, 83:24, 84:10, 86:8, 88:19, 89:9, 94:17, 94:20, 94:22, 95:7, 96:5, 96:15, 96:21, 97:6, 97:15, 98:11, 100:6, 100:16, 102:4, 103:1, 103:3, 103:5, 104:17, 105:1, 105:4, 109:24, 112:14, 112:21, 115:8, 115:9, 115:12, 115:14, 115:23, 116:1, 116:20, 116:22, 117:2, 117:17, 119:1, 119:4, 119:10, 120:4, 121:3, 121:7, 121:15 multiple [3] - 15:5, 36:14, 36:16 must [9] - 16:5, 20:21, 26:15, 26:16, 27:16, 32:23, 42:21, 81:4, 91:20 myriad [3] - 38:24, 39:2, 40:22</p>	<p>new [4] - 11:14, 43:13, 46:12, 86:17 New [4] - 2:5, 2:14, 122:11, 122:12 NEW [2] - 1:1, 1:16 next [10] - 14:24, 21:2, 32:5, 35:11, 67:2, 92:6, 94:14, 94:22, 95:22, 98:9 nice [1] - 119:25 night [1] - 121:21 nine [2] - 40:14, 40:17 NO [1] - 1:9 nobody [3] - 45:14, 48:18, 112:2 non [2] - 34:4, 72:18 non-equity [2] - 34:4, 72:18 none [8] - 14:6, 16:1, 16:2, 16:8, 74:16, 87:22, 104:5, 110:6 nonetheless [1] - 18:18 nonmoving [1] - 102:22 nonparticipant [7] - 101:15, 105:24, 107:9, 111:16, 113:1, 115:24, 116:2 notably [1] - 53:23 Notary [1] - 122:11 note [3] - 26:25, 54:25, 87:1 noted [5] - 28:4, 67:25, 90:25, 92:8, 92:11 notes [1] - 122:12 nothing [22] - 32:1, 36:22, 40:15, 45:14, 46:4, 59:17, 74:23, 77:19, 84:4, 85:15, 85:23, 92:25, 93:4, 97:2, 101:1, 102:24, 104:12, 106:9, 107:10, 108:3, 116:14 notice [3] - 23:20, 23:25, 77:19 notion [10] - 18:5, 19:1, 39:5, 79:11, 79:23, 97:11, 112:22, 114:3, 114:21, 115:2 notional [2] - 41:23, 52:22 November [2] - 55:5, 55:9 number [21] - 6:1, 8:25, 15:18, 17:2, 18:8, 21:17, 32:4, 43:24, 46:24, 53:25, 54:17, 57:7, 57:8, 69:21, 70:15, 72:22, 86:18, 103:22, 116:15, 117:18 numbers [3] - 43:10, 70:20, 71:3 numerous [1] - 90:24</p>
	N	
<p>N.J [1] - 122:16 nail [1] - 24:4 name [1] - 105:4 named [10] - 25:13, 26:1, 26:24, 31:9, 59:1, 64:8, 64:10, 65:17, 67:7, 116:4 names [1] - 55:12 narrowed [1] - 86:23 National [1] - 82:17 nature [6] - 6:3, 12:24, 26:16, 56:14, 70:6, 75:25 necessarily [7] - 21:4, 34:6, 39:12, 41:5, 44:13, 50:8, 79:3 necessary [7] - 6:16, 20:1, 23:3, 29:1, 58:7, 84:8, 85:2 necessity [1] - 13:2 need [13] - 7:1, 11:5, 11:6, 12:17, 13:7, 17:4, 28:12, 57:25, 67:8, 67:9, 112:6, 113:13, 118:10 needed [2] - 91:23, 94:12 needs [7] - 44:11, 58:3, 63:9, 108:20, 108:25, 110:23, 120:4 nephew [1] - 77:18 net [2] - 44:18, 45:7 never [15] - 90:10, 90:11, 98:6, 101:22, 106:12, 106:13, 106:21, 106:23, 107:17, 107:18, 108:13, 110:15, 111:1, 111:7, 114:11</p>		
	O	
		<p>objective [1] - 32:1 objectives [4] - 31:19, 31:21, 32:21, 60:2 obligation [6] - 11:4, 14:4, 27:19, 27:21, 27:22, 79:13 obvious [1] - 50:18 obviously [4] - 29:4, 58:3, 103:19, 117:3 occasions [1] - 90:24 occurred [4] - 37:18, 43:5, 44:7, 68:6 October [3] - 9:25, 35:4, 69:2 OF [1] - 1:1 offer [2] - 11:4, 39:23 Official [2] - 122:10, 122:15 OFFICIAL [1] - 1:25 offset [1] - 114:3</p>

<p>often [2] - 96:9, 118:20</p> <p>old [10] - 39:6, 40:13, 47:20, 47:21, 56:10, 56:16, 57:17, 73:2, 73:6, 118:2</p> <p>older [6] - 19:2, 19:8, 21:15, 48:10, 113:15, 118:8</p> <p>olds [3] - 42:1, 73:5, 118:1</p> <p>once [13] - 5:18, 7:15, 13:20, 17:21, 54:8, 59:16, 61:20, 62:14, 73:11, 76:22, 77:1, 118:16, 120:22</p> <p>one [104] - 3:18, 7:8, 8:8, 8:19, 14:24, 14:25, 15:8, 15:18, 16:5, 16:6, 17:2, 17:17, 18:8, 19:19, 20:9, 20:18, 21:14, 22:11, 23:5, 23:8, 23:17, 24:5, 26:10, 26:15, 30:7, 34:13, 34:14, 36:1, 36:5, 36:13, 36:17, 37:3, 38:3, 41:3, 41:13, 41:14, 41:15, 47:10, 47:20, 47:21, 49:11, 50:11, 51:21, 51:24, 54:4, 55:3, 55:6, 55:10, 58:1, 61:8, 62:21, 63:10, 63:15, 64:14, 65:17, 67:18, 69:7, 69:14, 69:21, 69:24, 71:16, 72:2, 72:23, 74:6, 74:7, 74:14, 75:14, 78:5, 78:6, 80:23, 84:7, 84:12, 86:24, 87:4, 87:13, 89:24, 90:21, 95:3, 100:18, 100:19, 102:4, 103:3, 103:4, 103:24, 105:19, 107:3, 109:4, 109:8, 110:23, 111:24, 112:22, 113:10, 113:12, 114:8, 114:25, 116:17, 117:18, 117:20, 118:2, 118:24</p> <p>ONE [1] - 1:15</p> <p>One [5] - 80:17, 80:19, 89:11, 103:9, 121:14</p> <p>one's [1] - 19:11</p> <p>ones [1] - 87:3</p> <p>ongoing [1] - 53:3</p> <p>onset [1] - 99:16</p> <p>onward [1] - 82:2</p> <p>operate [1] - 91:20</p> <p>operates [2] - 55:17, 82:22</p> <p>operating [2] - 37:6, 83:9</p> <p>opine [1] - 96:21</p> <p>opined [1] - 94:9</p> <p>Opinion [3] - 55:22, 81:1, 121:19</p> <p>opinion [6] - 17:14, 30:12, 31:20, 110:21, 110:22, 111:22</p> <p>opinions [1] - 28:6</p> <p>opportunities [1] - 60:18</p> <p>opportunity [11] - 18:22, 19:22, 24:19, 28:9, 28:14, 41:18, 44:16, 80:24, 88:24, 89:1, 95:4</p> <p>opposed [4] - 55:9, 55:10, 55:16</p> <p>opposing [1] - 97:14</p> <p>opposite [1] - 97:8</p> <p>opposition [3] - 30:25, 57:3, 97:3</p> <p>opt [4] - 22:9, 26:6, 26:7</p> <p>optimal [3] - 18:12, 19:13, 38:15</p> <p>opting [2] - 23:5, 23:6</p> <p>option [7] - 20:14, 54:6, 55:2, 58:13, 62:19, 65:4</p> <p>options [1] - 54:25</p> <p>oral [3] - 3:4, 104:23, 115:16</p>	<p>Order [1] - 96:23</p> <p>order [9] - 4:11, 6:16, 22:16, 24:9, 29:16, 42:11, 64:5, 92:24, 110:21</p> <p>ordered [1] - 46:16</p> <p>orientation [2] - 31:24, 53:6</p> <p>origin [1] - 17:9</p> <p>original [4] - 80:22, 82:18, 103:7, 122:12</p> <p>originally [4] - 47:7, 52:13, 90:15, 90:19</p> <p>otherwise [8] - 14:6, 14:19, 27:4, 32:2, 44:24, 79:24, 84:3</p> <p>ought [2] - 43:4, 57:13</p> <p>outcome [3] - 10:9, 12:21, 65:13</p> <p>outlined [2] - 13:3, 60:12</p> <p>outlook [1] - 33:17</p> <p>outs [4] - 22:9, 26:6, 26:7, 64:6</p> <p>outset [1] - 78:14</p> <p>outside [9] - 9:18, 65:22, 75:1, 75:23, 80:25, 107:18, 114:11, 114:12, 118:19</p> <p>outstanding [1] - 52:2</p> <p>overall [1] - 44:2</p> <p>overlap [1] - 27:17</p> <p>overlay [1] - 6:11</p> <p>oversight [1] - 18:20</p> <p>owed [1] - 91:14</p> <p>own [9] - 40:20, 41:19, 47:22, 52:19, 55:18, 55:19, 113:8, 115:4</p> <p>ownership [1] - 52:23</p>	<p>54:10, 55:1, 55:13, 55:15, 55:18, 56:8, 56:18, 56:19, 56:21, 57:7, 58:13, 62:23, 66:10, 92:1, 92:3, 93:4, 93:6, 94:12, 94:24, 95:16, 100:8, 101:16, 101:20, 107:7, 113:2, 114:20</p> <p>participants [1] - 41:11</p> <p>participated [1] - 38:5</p> <p>participating [2] - 14:21, 65:11</p> <p>participation [3] - 50:14, 50:23, 76:13</p> <p>particular [4] - 32:4, 108:21, 110:22, 111:20</p> <p>particularly [4] - 7:20, 31:22, 54:23, 74:8</p> <p>parties [5] - 17:18, 26:1, 26:24, 27:10, 46:10</p> <p>party [2] - 97:13, 102:22</p> <p>party's [1] - 27:14</p> <p>passage [1] - 30:9</p> <p>past [3] - 39:9, 99:22, 101:16</p> <p>pay [5] - 53:2, 58:6, 73:1, 108:20</p> <p>payments [1] - 83:12</p> <p>Peachtree [1] - 2:8</p> <p>peaks [1] - 34:4</p> <p>Peck [1] - 115:20</p> <p>peeking [1] - 29:20</p> <p>Penata [1] - 117:10</p> <p>pension [7] - 23:16, 91:25, 115:22, 115:25, 116:1, 116:4</p> <p>people [38] - 8:25, 15:14, 19:1, 19:2, 21:14, 21:15, 23:16, 38:5, 39:13, 41:23, 43:8, 43:25, 44:10, 44:12, 44:21, 45:15, 45:16, 48:2, 48:9, 48:10, 49:7, 53:18, 54:14, 58:2, 58:4, 58:8, 58:20, 59:10, 79:18, 86:20, 109:3, 111:21, 113:15, 118:5, 118:8, 118:12, 119:20</p> <p>per [2] - 54:7, 62:19</p> <p>perceive [1] - 104:22</p> <p>percent [44] - 8:20, 11:9, 11:11, 19:3, 30:15, 33:11, 33:12, 34:5, 41:25, 42:1, 42:6, 44:14, 44:22, 47:23, 47:24, 50:14, 52:7, 54:7, 54:20, 58:14, 59:8, 59:25, 60:1, 60:15, 60:16, 62:19, 64:22, 67:18, 68:1, 68:8, 68:9, 72:11, 72:13, 72:14, 72:17, 87:15, 87:16, 93:14, 105:14, 105:15</p> <p>percentage [4] - 10:13, 10:19, 52:21, 52:23</p> <p>percentages [2] - 57:9, 106:19</p> <p>perfect [2] - 11:6, 46:3</p> <p>performance [11] - 11:20, 11:21, 12:3, 30:22, 34:15, 40:8, 52:2, 68:19, 68:20, 74:18, 76:20</p> <p>perhaps [3] - 57:19, 65:16, 117:23</p> <p>period [23] - 33:21, 35:19, 37:4, 37:7, 37:9, 38:2, 38:6, 41:7, 42:8, 49:3, 53:16, 60:24, 61:2, 61:12, 61:24, 68:10, 69:1, 71:15, 85:5, 113:12, 113:13</p> <p>periodically [1] - 73:18</p>
P		
<p>P.C [1] - 2:2</p> <p>Pacheco [12] - 13:19, 14:8, 39:9, 65:16, 65:19, 66:4, 66:9, 66:12, 66:17, 66:21, 77:7, 77:16</p> <p>PACHECO [1] - 1:4</p> <p>Page [9] - 8:23, 8:24, 10:1, 55:22, 68:25, 90:3, 99:18, 102:17, 103:7</p> <p>page [3] - 32:6, 90:8, 98:6</p> <p>pages [1] - 100:16</p> <p>paid [1] - 32:14</p> <p>papers [9] - 89:21, 93:8, 97:17, 102:2, 111:6, 112:17, 112:25, 119:8, 121:9</p> <p>paradigmatic [2] - 12:12, 15:2</p> <p>parameters [2] - 32:8, 65:22</p> <p>part [9] - 3:19, 15:17, 28:7, 31:14, 31:18, 73:1, 84:17, 94:15, 97:3</p> <p>partial [5] - 3:6, 4:13, 80:15, 104:19, 121:13</p> <p>partially [1] - 35:6</p> <p>participant [11] - 10:3, 18:14, 19:15, 23:11, 55:20, 65:19, 106:7, 106:20, 107:11, 109:14, 112:23</p> <p>participant's [1] - 31:7</p> <p>participants [55] - 5:4, 7:20, 8:20, 8:24, 18:22, 19:3, 20:2, 20:4, 36:8, 36:17, 38:25, 40:16, 41:22, 42:3, 45:4, 47:2, 48:17, 50:6, 50:24, 51:2, 52:4, 52:19, 53:3, 53:16, 53:17, 53:20, 53:21, 54:5,</p>		

<p>periods [1] - 42:3</p> <p>permissible [1] - 102:18</p> <p>permit [2] - 26:7, 61:21</p> <p>permits [3] - 4:15, 11:15, 18:20</p> <p>permitted [2] - 27:11, 32:9</p> <p>Peroxide [3] - 6:17, 27:8, 69:13</p> <p>person [6] - 19:5, 19:6, 19:8, 39:6, 45:6, 59:16</p> <p>personal [1] - 103:21</p> <p>personnel [1] - 99:14</p> <p>persons [1] - 1:5</p> <p>pertaining [1] - 121:8</p> <p>pertinent [2] - 71:19, 92:23</p> <p>Ph.D [3] - 109:21, 110:2, 110:11</p> <p>Phillips [1] - 13:4</p> <p>philosophy [1] - 87:10</p> <p>pick [3] - 50:21, 81:7, 107:22</p> <p>picked [3] - 108:3, 108:8, 108:9</p> <p>picking [1] - 61:23</p> <p>picture [2] - 28:21, 59:24</p> <p>pieces [1] - 113:6</p> <p>place [10] - 36:24, 36:25, 41:8, 42:24, 49:10, 52:12, 84:20, 91:12, 92:7, 95:9</p> <p>placed [3] - 52:14, 98:7, 100:25</p> <p>plain [3] - 26:4, 90:23, 91:3</p> <p>plaintiff [11] - 3:9, 5:6, 6:22, 14:14, 22:14, 26:14, 32:7, 37:7, 39:22, 66:9, 88:16</p> <p>plaintiffs [1] - 31:7</p> <p>Plaintiffs [1] - 1:7</p> <p>plaintiffs [76] - 3:12, 3:15, 4:18, 5:13, 5:19, 6:3, 6:24, 10:5, 11:2, 14:12, 19:22, 21:25, 24:6, 25:14, 29:23, 30:10, 31:9, 31:19, 32:2, 33:5, 33:9, 33:22, 35:11, 35:22, 36:13, 38:14, 39:4, 39:14, 40:25, 41:12, 44:17, 44:19, 45:10, 45:13, 45:15, 46:17, 48:1, 48:7, 48:12, 48:20, 49:6, 49:17, 50:3, 50:15, 51:7, 55:5, 55:23, 56:5, 59:2, 60:3, 60:7, 60:23, 61:15, 62:3, 65:8, 65:21, 66:16, 69:2, 86:14, 87:3, 87:24, 88:24, 89:10, 90:21, 94:5, 95:11, 96:2, 103:10, 103:14, 103:17, 104:9, 105:1, 105:12, 108:21, 111:4, 115:6</p> <p>PLAINTIFFS [1] - 2:5</p> <p>plaintiffs' [18] - 13:1, 25:7, 31:16, 35:24, 38:2, 38:12, 39:3, 40:18, 47:19, 47:22, 50:12, 51:18, 57:4, 88:11, 89:12, 98:11, 104:21, 111:2</p> <p>plan [40] - 32:2, 41:15, 41:16, 51:19, 51:24, 52:1, 53:9, 56:17, 56:19, 58:3, 58:6, 58:9, 73:1, 73:13, 76:11, 76:12, 76:14, 76:19, 76:22, 77:5, 91:25, 92:3, 100:12, 100:18, 101:19, 105:23, 106:23, 107:9, 107:14, 108:5, 109:14, 111:25, 116:11, 116:12, 116:13, 118:6, 118:8</p> <p>PLAN [1] - 1:6</p> <p>Plan [272] - 5:16, 5:17, 7:16, 7:19, 8:20,</p>	<p>9:8, 9:11, 11:11, 11:17, 11:21, 12:1, 12:2, 12:6, 12:24, 13:1, 15:4, 15:23, 16:5, 18:11, 18:13, 18:15, 19:13, 19:15, 19:17, 20:7, 20:13, 20:22, 21:10, 21:23, 25:12, 31:7, 32:22, 33:9, 36:8, 36:17, 37:1, 37:8, 38:5, 39:1, 39:6, 39:8, 39:14, 39:17, 39:20, 39:24, 40:1, 40:5, 40:8, 40:15, 40:16, 40:24, 41:2, 41:3, 41:4, 41:21, 41:24, 42:1, 42:3, 43:20, 44:16, 44:17, 45:5, 47:9, 47:11, 47:21, 48:14, 48:15, 49:8, 50:5, 50:12, 50:15, 50:23, 50:24, 51:2, 51:15, 51:19, 52:3, 52:6, 52:11, 52:17, 52:18, 52:21, 52:23, 52:25, 53:1, 53:12, 53:15, 53:19, 54:2, 54:4, 54:6, 54:7, 54:18, 54:20, 54:25, 55:4, 55:17, 55:18, 55:23, 56:9, 56:10, 56:11, 56:15, 56:23, 56:24, 56:25, 57:13, 58:11, 58:12, 58:20, 59:6, 59:10, 59:11, 59:12, 59:15, 59:20, 59:23, 60:2, 60:13, 60:20, 61:1, 62:14, 62:20, 63:1, 63:2, 63:5, 63:21, 64:1, 64:3, 64:20, 64:21, 65:1, 65:11, 65:12, 65:19, 65:23, 66:1, 66:4, 66:5, 66:8, 66:10, 66:11, 67:2, 67:25, 69:21, 70:7, 70:8, 70:9, 70:11, 70:23, 70:24, 70:25, 71:4, 71:5, 71:6, 71:11, 71:17, 71:19, 71:20, 72:7, 74:23, 75:1, 76:24, 77:8, 77:15, 77:17, 78:11, 78:16, 78:24, 79:14, 79:18, 80:20, 81:10, 81:15, 81:16, 81:18, 81:19, 82:2, 82:3, 82:6, 82:8, 82:9, 82:10, 82:12, 82:13, 83:2, 83:8, 83:10, 83:11, 83:12, 83:13, 83:14, 83:21, 83:23, 84:3, 84:15, 84:17, 85:1, 85:17, 85:19, 85:23, 86:17, 86:22, 87:10, 88:9, 89:21, 89:24, 90:2, 90:4, 90:12, 90:13, 90:14, 90:15, 90:17, 90:18, 90:19, 90:23, 90:24, 91:1, 91:3, 91:7, 91:17, 91:20, 91:21, 91:24, 92:2, 92:5, 92:12, 92:13, 92:14, 92:20, 92:22, 92:23, 92:24, 93:2, 93:23, 94:11, 95:15, 98:4, 98:6, 98:17, 99:3, 99:5, 100:7, 101:23, 102:12, 105:24, 106:18, 107:7, 108:21, 110:1, 111:1, 111:2, 111:3, 113:25, 114:13, 116:10, 119:11</p> <p>plan's [2] - 76:20, 108:22</p> <p>Plan's [12] - 11:20, 30:14, 31:19, 35:25, 42:6, 47:16, 47:17, 51:5, 56:2, 95:17</p> <p>planner [2] - 59:5, 76:7</p> <p>plans [19] - 46:11, 46:14, 51:25, 94:8, 98:21, 100:12, 101:8, 101:15, 101:17, 109:25, 110:7, 111:5, 111:16, 113:7, 116:6, 116:9, 116:21, 117:3, 117:4</p> <p>plant [1] - 64:12</p> <p>plausibility [2] - 43:4, 67:22</p> <p>plausible [20] - 5:22, 6:8, 11:4, 20:24, 39:20, 44:17, 60:3, 79:3, 79:6, 79:7, 79:11, 79:23, 80:5, 88:21, 105:8, 105:18, 112:4, 112:5, 119:21, 120:6</p>	<p>PLAZA [1] - 1:15</p> <p>pleading [1] - 28:22</p> <p>pleadings [2] - 81:2, 81:3</p> <p>Plough [2] - 12:11, 77:24</p> <p>plug [1] - 109:17</p> <p>PNC [5] - 52:13, 82:18, 82:19, 83:18</p> <p>pocket [1] - 47:1</p> <p>point [16] - 14:7, 16:10, 31:22, 36:6, 36:11, 36:18, 41:9, 43:11, 47:4, 58:2, 58:8, 64:9, 64:10, 74:1, 76:23, 117:15</p> <p>pointed [1] - 111:6</p> <p>points [3] - 67:5, 73:8, 78:5</p> <p>polices [1] - 116:9</p> <p>policies [1] - 119:13</p> <p>Policy [31] - 30:14, 31:1, 31:14, 31:18, 32:5, 32:12, 33:7, 53:1, 53:4, 54:13, 66:7, 68:4, 68:8, 69:20, 85:4, 85:25, 91:12, 92:7, 92:9, 92:25, 93:5, 93:10, 93:17, 93:19, 93:22, 94:4, 94:10, 102:1, 102:17, 106:15</p> <p>policy [8] - 10:10, 11:14, 37:1, 37:6, 67:18, 83:8, 85:8, 92:24</p> <p>Pomerantz [35] - 11:10, 11:19, 11:25, 20:23, 30:13, 31:20, 36:7, 39:23, 40:10, 46:13, 66:8, 68:3, 68:15, 71:12, 71:14, 71:22, 73:22, 74:25, 75:3, 75:8, 93:16, 104:20, 105:17, 105:21, 106:4, 106:16, 108:7, 109:20, 110:3, 111:4, 117:24, 118:16, 119:17</p> <p>Pomerantz's [6] - 21:6, 40:20, 41:25, 42:2, 42:7, 115:18</p> <p>population [4] - 10:3, 10:4, 18:14, 53:15</p> <p>portfolio [9] - 7:19, 10:19, 10:22, 11:18, 31:23, 34:10, 34:11, 93:14, 103:22</p> <p>portion [3] - 30:13, 34:21, 71:20</p> <p>portions [1] - 41:16</p> <p>posited [1] - 40:13</p> <p>position [10] - 20:15, 26:4, 31:23, 34:17, 76:22, 89:24, 90:6, 90:16, 90:22, 97:16</p> <p>positions [4] - 15:15, 27:14, 89:15, 97:25</p> <p>posits [1] - 40:18</p> <p>possibility [5] - 14:21, 14:25, 15:1, 15:7, 23:9</p> <p>possible [4] - 14:15, 71:23, 85:18, 96:15</p> <p>post [1] - 38:19</p> <p>pot [1] - 41:13</p> <p>potential [1] - 87:1</p> <p>potentially [1] - 30:4</p> <p>power [1] - 85:22</p> <p>practical [1] - 28:11</p> <p>practice [2] - 16:17, 55:5</p> <p>preamble [1] - 113:3</p> <p>precipitated [2] - 16:22, 16:24</p> <p>precise [1] - 84:25</p> <p>precisely [3] - 27:10, 43:16, 43:22</p> <p>preclude [2] - 104:20, 104:21</p> <p>precluding [1] - 121:9</p> <p>predated [1] - 82:13</p>
--	---	---

<p>predates ^[1] - 38:16</p> <p>predicated ^[1] - 39:3</p> <p>prefer ^[5] - 18:6, 19:1, 19:5, 19:6, 73:14</p> <p>preferable ^[1] - 21:7</p> <p>preference ^[2] - 4:12, 29:18</p> <p>preferences ^[1] - 39:11</p> <p>prefers ^[3] - 18:15, 18:16, 63:23</p> <p>premature ^[2] - 96:2, 96:6</p> <p>premise ^[1] - 48:1</p> <p>prepared ^[8] - 68:13, 68:17, 68:22, 69:8, 75:10, 96:20, 101:23, 115:15</p> <p>preparing ^[1] - 75:4</p> <p>prerequisites ^[1] - 24:10</p> <p>present ^[4] - 39:10, 53:15, 53:17, 110:4</p> <p>presentations ^[1] - 86:21</p> <p>presented ^[6] - 28:8, 87:2, 87:7, 107:23, 110:6, 112:24</p> <p>presenting ^[1] - 28:10</p> <p>preservation ^[1] - 69:21</p> <p>preserve ^[2] - 78:15, 79:17</p> <p>preserved ^[1] - 79:18</p> <p>president ^[1] - 115:20</p> <p>presumably ^[1] - 90:9</p> <p>presume ^[1] - 5:25</p> <p>pretty ^[5] - 42:17, 77:3, 78:18, 79:7, 109:21</p> <p>prevail ^[9] - 10:24, 17:6, 20:11, 21:10, 28:24, 44:20, 45:13, 45:15, 46:20</p> <p>prevailing ^[2] - 32:25, 46:1</p> <p>previously ^[4] - 83:21, 91:4, 91:7, 92:13</p> <p>price ^[1] - 73:1</p> <p>primarily ^[1] - 25:10</p> <p>prime ^[3] - 44:8, 45:10, 45:23</p> <p>Princeton ^[1] - 2:14</p> <p>principal ^[2] - 3:19, 78:16</p> <p>principally ^[1] - 78:18</p> <p>principles ^[4] - 6:11, 25:23, 26:21, 27:7</p> <p>private ^[2] - 73:10, 106:22</p> <p>privately ^[1] - 51:20</p> <p>problem ^[3] - 42:18, 48:11, 50:4</p> <p>problems ^[3] - 23:25, 25:14, 38:11</p> <p>procedure ^[3] - 5:1, 29:14, 83:11</p> <p>Procedures ^[1] - 83:7</p> <p>procedures ^[1] - 83:8</p> <p>proceed ^[7] - 4:19, 18:16, 22:16, 69:8, 69:13, 69:16, 77:20</p> <p>proceeding ^[2] - 18:19, 26:19</p> <p>proceedings ^[1] - 121:22</p> <p>proceeds ^[1] - 84:22</p> <p>process ^[6] - 37:11, 48:23, 49:15, 49:18, 86:17, 96:8</p> <p>processes ^[1] - 32:15</p> <p>produced ^[1] - 92:10</p> <p>producers ^[1] - 51:21</p> <p>produces ^[1] - 120:1</p> <p>product ^[1] - 34:8</p> <p>products ^[1] - 117:9</p> <p>professional ^[1] - 60:19</p> <p>proffer ^[1] - 96:10</p>	<p>Profit ^[6] - 81:18, 82:8, 82:9, 82:12, 84:17, 90:14</p> <p>profit ^[6] - 51:24, 51:25, 106:23, 116:11, 116:12, 116:13</p> <p>profitable ^[1] - 6:1</p> <p>profits ^[2] - 21:24, 52:6</p> <p>PROFITS ^[1] - 1:6</p> <p>profound ^[1] - 62:12</p> <p>prohibited ^[5] - 12:6, 24:23, 47:6, 70:1, 70:2</p> <p>prohibitive ^[1] - 120:17</p> <p>promoted ^[1] - 51:17</p> <p>prompted ^[1] - 13:22</p> <p>prong ^[3] - 25:8, 26:13, 26:22</p> <p>prongs ^[1] - 77:23</p> <p>pronounced ^[1] - 46:12</p> <p>proof ^[3] - 5:14, 5:19, 73:19</p> <p>proper ^[2] - 9:10, 39:5</p> <p>properly ^[1] - 43:9</p> <p>proposal ^[5] - 6:2, 19:14, 68:15, 99:3, 101:23</p> <p>propose ^[1] - 5:20</p> <p>proposed ^[16] - 11:10, 18:23, 50:25, 51:5, 65:1, 68:3, 71:12, 71:23, 73:20, 77:14, 87:3, 102:8, 106:4, 107:16, 107:19, 109:16</p> <p>proposing ^[3] - 72:18, 108:14, 110:8</p> <p>proposition ^[5] - 27:5, 36:23, 37:22, 39:23, 40:19</p> <p>propriety ^[4] - 12:19, 18:23, 19:10</p> <p>prosecution ^[2] - 15:19, 69:7</p> <p>prosecutions ^[1] - 104:5</p> <p>protect ^[2] - 63:25, 118:6</p> <p>protecting ^[1] - 118:14</p> <p>protective ^[2] - 22:16, 22:20</p> <p>prove ^[1] - 6:1</p> <p>proven ^[2] - 48:6, 86:5</p> <p>provide ^[10] - 6:7, 19:22, 19:23, 21:24, 25:5, 27:11, 53:13, 84:24, 94:6, 105:19</p> <p>provided ^[20] - 6:24, 8:17, 8:22, 10:20, 13:14, 13:19, 32:17, 33:25, 41:10, 45:11, 68:18, 68:23, 71:12, 83:8, 102:2, 102:10, 105:13, 106:11, 113:18</p> <p>Provident ^[2] - 52:14, 82:16</p> <p>provider ^[3] - 92:10, 98:19, 99:5</p> <p>providers ^[1] - 102:10</p> <p>provides ^[2] - 32:23, 91:19</p> <p>providing ^[1] - 45:21</p> <p>provision ^[5] - 85:17, 92:20, 93:15, 93:16, 109:18</p> <p>provisions ^[4] - 81:24, 83:6, 83:22, 85:11</p> <p>provocative ^[1] - 80:13</p> <p>proxy ^[3] - 39:4, 47:19, 50:7</p> <p>prudence ^[7] - 5:11, 32:24, 38:15, 109:7, 109:9, 114:7, 114:15</p> <p>prudent ^[9] - 32:25, 51:1, 71:23, 73:23, 74:11, 86:8, 114:6, 114:8, 114:16</p>	<p>prudently ^[1] - 95:15</p> <p>Public ^[1] - 122:11</p> <p>published ^[1] - 118:21</p> <p>pull ^[1] - 40:24</p> <p>pulls ^[1] - 36:9</p> <p>pure ^[1] - 37:10</p> <p>purely ^[2] - 35:11, 36:5</p> <p>purport ^[1] - 110:17</p> <p>purported ^[2] - 31:10, 44:5</p> <p>purports ^[1] - 112:7</p> <p>purpose ^[2] - 26:23, 101:25</p> <p>purposes ^[5] - 37:14, 41:16, 52:22, 66:2, 97:11</p> <p>pursuant ^[1] - 81:24</p> <p>put ^[12] - 41:8, 44:17, 49:10, 50:15, 51:15, 59:5, 67:17, 78:6, 79:2, 85:9, 85:16, 102:6</p>
Q		
<p>qualification ^[7] - 9:22, 105:21, 105:25, 110:5, 110:9, 110:23</p> <p>qualifications ^[8] - 99:14, 104:8, 109:5, 109:6, 109:17, 109:19, 109:20, 117:11</p> <p>qualified ^[8] - 22:14, 22:17, 99:5, 99:8, 110:23, 111:10, 111:20, 117:9</p> <p>qualify ^[3] - 22:15, 22:25, 24:10</p> <p>quality ^[2] - 118:17, 120:7</p> <p>questioned ^[2] - 66:22, 87:9</p> <p>questions ^[30] - 7:5, 7:21, 8:2, 10:8, 12:16, 12:21, 22:2, 25:23, 26:2, 26:18, 28:10, 38:17, 67:12, 67:13, 78:3, 80:6, 95:3, 98:8, 99:15, 99:20, 99:21, 99:25, 100:3, 102:23, 106:1, 106:3, 111:18, 112:8, 115:7, 121:18</p> <p>quibbling ^[1] - 49:2</p> <p>quite ^[5] - 11:10, 11:11, 23:20, 46:15, 86:16</p> <p>quote ^[1] - 93:12</p> <p>quoted ^[1] - 113:4</p> <p>quotes ^[1] - 102:1</p> <p>quoting ^[1] - 55:22</p>		
R		
<p>raise ^[1] - 51:9</p> <p>raised ^[5] - 91:10, 95:22, 97:16, 100:24, 115:16</p> <p>raises ^[1] - 11:1</p> <p>raising ^[1] - 26:18</p> <p>ramp ^[1] - 54:14</p> <p>range ^[3] - 105:13, 105:14, 106:16</p> <p>ranged ^[1] - 105:14</p> <p>ranges ^[1] - 108:1</p> <p>rapidly ^[1] - 74:10</p> <p>rare ^[2] - 111:3, 111:7</p> <p>rates ^[2] - 120:18</p> <p>rather ^[9] - 19:21, 26:19, 27:12, 34:17,</p>		

<p>43:2, 47:18, 49:1, 74:10, 102:12 ratio [1] - 60:17 rational [2] - 49:1, 49:15 Re [1] - 12:11 reach [3] - 8:25, 13:22, 86:11 reached [2] - 13:12, 29:2 read [3] - 35:15, 66:15, 96:11 reading [1] - 79:9 reads [1] - 81:22 ready [1] - 94:5 real [4] - 49:1, 49:16, 60:6, 120:3 realize [2] - 111:1, 121:4 reallocate [1] - 74:11 really [25] - 44:9, 46:4, 49:6, 49:18, 54:14, 56:22, 58:11, 59:17, 60:13, 61:14, 62:1, 63:1, 63:5, 63:16, 63:20, 65:22, 66:13, 73:9, 77:7, 85:22, 94:19, 104:2, 111:12, 114:20 reams [1] - 32:17 reason [11] - 30:8, 33:22, 39:2, 50:3, 50:18, 69:7, 69:14, 70:19, 84:2, 90:21, 103:9 reasonable [8] - 7:2, 21:21, 36:3, 88:17, 97:23, 97:24, 120:11, 120:24 reasonably [1] - 58:10 reasoned [1] - 49:15 reasons [8] - 20:9, 55:6, 66:3, 69:6, 86:4, 90:1, 102:19, 117:18 Reath [3] - 3:24, 4:5, 4:8 REATH [1] - 2:10 rebalance [1] - 10:22 rebound [1] - 62:15 receive [2] - 23:24, 96:1 received [2] - 17:19 recent [6] - 6:12, 17:9, 17:20, 69:15, 82:10 recently [3] - 27:5, 47:7, 96:20 recited [1] - 83:6 reckoning [1] - 95:5 recognized [1] - 120:21 recognizing [1] - 114:7 recommend [2] - 93:13, 111:18 recommendations [2] - 10:18, 60:19 recommended [12] - 11:17, 34:16, 35:21, 63:15, 87:14, 102:13, 106:22, 106:24, 107:17, 107:25, 108:2 recommending [1] - 93:16 recommends [1] - 30:15 reconcile [3] - 19:15, 20:1, 45:8 reconciliation [1] - 116:23 record [22] - 3:9, 27:25, 28:2, 28:15, 30:12, 52:21, 80:25, 81:9, 86:16, 87:19, 88:13, 94:15, 95:25, 97:4, 97:12, 100:17, 103:23, 104:1, 107:23, 108:3, 108:6, 108:15 records [1] - 104:13 recover [2] - 63:6, 71:5 recovered [1] - 69:25 recoveries [2] - 41:1, 70:7</p>	<p>recovers [1] - 76:12 recovery [11] - 12:24, 12:25, 14:17, 15:23, 16:5, 41:2, 44:2, 62:25, 70:8, 71:16, 71:17 red [2] - 33:13, 100:24 refer [2] - 8:19, 83:17 reference [2] - 84:15, 85:24 referenced [1] - 32:7 references [1] - 101:12 referred [3] - 11:12, 25:7, 71:23 refers [3] - 81:23, 82:12, 90:24 reflect [1] - 100:18 reflects [3] - 90:9, 98:6, 108:6 regard [19] - 6:6, 8:3, 8:18, 13:3, 13:10, 13:19, 14:8, 17:1, 17:3, 59:2, 76:4, 77:15, 89:15, 115:16, 115:18, 117:4, 120:7, 120:22, 121:11 regarding [2] - 97:17, 101:13 regardless [1] - 48:5 regards [1] - 104:25 Register [2] - 9:25, 10:1 registered [1] - 100:23 regret [1] - 29:12 regrets [1] - 29:4 regular [1] - 109:1 regulation [1] - 113:3 regulations [4] - 78:18, 79:20, 82:6, 107:5 Regulations [1] - 9:20 REINALDO [1] - 1:3 reinforces [1] - 81:25 related [4] - 24:23, 26:2, 39:25, 110:14 relates [2] - 9:4, 25:2 relationship [3] - 16:23, 16:24, 103:10 relatively [1] - 17:9 relevance [1] - 43:10 relevant [12] - 4:24, 27:17, 27:20, 27:21, 30:5, 31:3, 33:18, 43:4, 78:11, 83:6, 117:14, 120:6 reliable [5] - 8:16, 118:18, 119:24, 120:21 reliance [1] - 17:4 relied [4] - 75:8, 99:23, 100:4, 100:21 relies [1] - 63:11 reluctant [1] - 97:4 rely [6] - 30:12, 75:6, 76:6, 89:3, 115:16, 121:3 remain [3] - 36:19, 50:19, 64:2 remained [1] - 35:6 remaining [3] - 24:25, 25:2, 80:11 remarkably [1] - 52:1 remedial [1] - 68:5 remedy [5] - 38:7, 46:3, 46:16, 49:5, 51:6 remember [1] - 50:11 remote [1] - 63:16 render [3] - 17:14, 51:6, 99:8 reorganization [1] - 88:7 repaid [1] - 12:6</p>	<p>repair [1] - 117:8 repeat [2] - 13:7, 107:1 repeated [1] - 111:23 repeatedly [1] - 108:18 replete [1] - 81:25 replicating [1] - 120:19 reply [3] - 9:24, 94:25, 97:17 report [19] - 17:18, 21:9, 41:10, 68:25, 70:22, 75:5, 78:13, 80:1, 94:5, 94:9, 96:3, 96:19, 96:22, 97:10, 106:6, 106:9, 109:4, 113:19 reported [1] - 8:19 Reporter [3] - 122:10, 122:11, 122:15 REPORTER [1] - 1:25 reports [9] - 10:21, 17:21, 72:13, 74:7, 87:21, 96:7, 96:24, 104:3, 104:23 repository [1] - 84:20 represent [3] - 26:25, 51:7, 105:5 representation [1] - 77:13 representative [16] - 1:4, 14:3, 14:5, 39:1, 50:16, 50:17, 63:8, 64:5, 64:17, 66:9, 66:19, 66:20, 66:23, 77:15, 77:21 representatives [17] - 14:8, 14:18, 14:22, 31:10, 50:12, 64:8, 64:9, 64:10, 65:17, 66:20, 67:7, 67:8, 67:9, 76:5, 77:10, 86:15, 87:23 represented [2] - 27:3, 33:13 representing [2] - 4:5, 101:8 request [2] - 8:17, 97:8 requested [1] - 102:11 require [6] - 10:2, 14:14, 21:18, 84:24, 91:10, 91:17 required [6] - 10:3, 14:18, 60:8, 69:9, 69:11, 72:7 requirement [5] - 25:11, 56:3, 63:24, 85:2 requirements [5] - 8:12, 14:24, 15:16, 23:20, 37:15 requires [11] - 26:13, 27:9, 56:18, 92:15, 92:21, 93:23, 96:14, 98:18, 110:24, 113:23, 116:23 requiring [1] - 15:20 reread [2] - 80:25, 81:7 reserve [3] - 80:11, 104:18, 121:10 reserved [1] - 121:11 resolution [5] - 18:21, 26:17, 26:20, 38:23, 42:12 resolve [2] - 27:16, 85:18 resolved [6] - 6:6, 18:21, 41:14, 47:12, 66:25, 95:20 resources [1] - 62:10 respect [9] - 63:2, 91:16, 101:2, 104:8, 105:5, 105:12, 105:25, 108:24, 109:25 respectfully [10] - 15:15, 18:7, 21:25, 25:20, 80:4, 89:14, 90:1, 92:17, 95:1, 97:23 respective [1] - 27:14 respects [1] - 104:9 respond [2] - 95:4, 103:16</p>
---	---	--

<p>responded [2] - 82:5, 103:14</p> <p>response [8] - 8:17, 78:9, 78:10, 89:2, 97:9, 103:5, 111:1, 111:2</p> <p>responsibilities [2] - 83:9, 120:2</p> <p>responsible [1] - 98:16</p> <p>rest [7] - 30:16, 31:13, 58:10, 59:7, 65:10, 85:16, 104:24</p> <p>restatement [3] - 82:7, 90:15, 90:19</p> <p>restating [1] - 92:12</p> <p>restoration [1] - 47:11</p> <p>restore [1] - 15:12</p> <p>restricted [1] - 101:25</p> <p>restructuring [1] - 88:8</p> <p>result [9] - 23:11, 27:3, 27:15, 29:2, 42:22, 44:18, 70:6, 86:2, 88:10</p> <p>resulted [1] - 6:9</p> <p>results [4] - 15:1, 15:8, 23:24, 26:8</p> <p>retain [1] - 77:4</p> <p>retained [2] - 98:15, 99:16</p> <p>retaining [2] - 7:13, 98:19</p> <p>retention [2] - 100:1, 101:17</p> <p>retire [14] - 40:13, 53:18, 54:19, 54:22, 58:2, 58:5, 58:25, 62:9, 62:10, 62:12, 62:17, 62:18, 62:22, 79:19</p> <p>retired [5] - 58:19, 59:3, 62:8, 62:20, 62:25</p> <p>retirement [18] - 8:21, 53:2, 53:11, 53:13, 53:25, 54:12, 58:17, 59:14, 62:9, 65:24, 66:3, 66:11, 74:25, 94:8, 98:21, 100:12, 101:19, 116:9</p> <p>retires [1] - 59:16</p> <p>retrospect [1] - 20:12</p> <p>retrospective [1] - 37:14</p> <p>retrospectively [1] - 41:8</p> <p>return [1] - 79:1</p> <p>returned [1] - 120:17</p> <p>returns [4] - 31:25, 53:6, 60:5, 61:11</p> <p>Revenue [3] - 82:4, 82:5, 82:6</p> <p>reverse [1] - 16:21</p> <p>reverted [1] - 71:13</p> <p>review [2] - 92:23, 100:19</p> <p>reviewed [1] - 11:19</p> <p>reviewing [2] - 34:15, 87:19</p> <p>revised [1] - 43:13</p> <p>rigid [3] - 73:20, 73:22</p> <p>rigidly [1] - 73:17</p> <p>rigorously [1] - 6:18</p> <p>ring [1] - 87:7</p> <p>rise [1] - 3:1</p> <p>risk [8] - 47:19, 64:24, 65:2, 65:7, 74:25, 77:7, 92:16, 92:19</p> <p>risk/return [1] - 31:23</p> <p>risk/reward [1] - 53:6</p> <p>risky [1] - 63:23</p> <p>road [1] - 61:20</p> <p>Road [2] - 2:4, 2:13</p> <p>Robert [3] - 3:13, 73:8, 89:10</p> <p>ROBERT [1] - 2:4</p> <p>rock [1] - 62:20</p>	<p>role [4] - 6:23, 19:12, 85:6, 111:14</p> <p>roughly [1] - 53:16</p> <p>Rowan [2] - 51:20, 51:22</p> <p>Rowan's [1] - 103:21</p> <p>rudimentary [2] - 64:13, 99:6</p> <p>Rule [6] - 6:16, 8:12, 12:10, 15:16, 28:7, 67:22</p> <p>rule [2] - 25:25, 28:9</p> <p>ruled [3] - 20:12, 20:13, 91:7</p> <p>rules [3] - 29:14, 33:6</p> <p>ruling [3] - 24:22, 46:9, 103:13</p> <p>run [2] - 13:5, 22:25</p> <p>running [1] - 115:11</p> <p style="text-align: center;">S</p> <p>S&P [3] - 33:20, 34:2, 49:23</p> <p>S/Lisa [1] - 122:14</p> <p>safe [3] - 9:21, 9:23, 107:12</p> <p>salaries [1] - 21:13</p> <p>sat [1] - 87:8</p> <p>satisfaction [1] - 114:9</p> <p>satisfy [8] - 14:24, 15:16, 83:15, 84:23, 85:13, 105:25, 109:5, 109:16</p> <p>save [1] - 115:6</p> <p>Savings [1] - 52:14</p> <p>savings [1] - 59:14</p> <p>saw [3] - 28:9, 52:25, 108:1</p> <p>SAWICKI [33] - 2:7, 3:16, 24:17, 24:19, 25:16, 28:3, 28:11, 29:4, 29:22, 34:6, 34:12, 34:23, 34:25, 35:22, 37:17, 37:20, 37:25, 38:10, 39:22, 41:5, 42:16, 42:18, 43:11, 44:4, 44:11, 45:1, 45:18, 46:6, 46:19, 46:22, 49:12, 49:14, 50:2</p> <p>Sawicki [4] - 3:17, 24:16, 60:12, 65:13</p> <p>scenario [1] - 86:15</p> <p>schemes [1] - 14:20</p> <p>Schering [3] - 12:11, 15:2, 77:24</p> <p>school [1] - 117:8</p> <p>scope [1] - 69:17</p> <p>score [1] - 31:12</p> <p>screen [2] - 67:18, 85:9</p> <p>screenings [1] - 87:7</p> <p>scrutiny [1] - 114:25</p> <p>seasoned [1] - 36:3</p> <p>seated [1] - 3:2</p> <p>SEC [4] - 9:16, 79:21, 87:20, 100:24</p> <p>Second [1] - 5:21</p> <p>second [12] - 4:14, 7:11, 10:8, 11:2, 12:22, 15:25, 35:12, 61:22, 78:7, 95:24, 105:10</p> <p>secondly [13] - 5:2, 5:15, 5:20, 6:17, 6:23, 13:19, 15:22, 17:8, 18:25, 68:13, 90:12, 92:11, 104:1</p> <p>Section [12] - 32:22, 83:7, 83:10, 83:20, 84:23, 85:3, 85:19, 90:24, 90:25, 92:17, 93:2, 102:1</p> <p>section [2] - 33:13, 101:25</p>	<p>Securities [1] - 25:3</p> <p>Security [1] - 112:16</p> <p>see [22] - 13:22, 26:9, 35:16, 40:25, 43:20, 50:3, 62:13, 66:17, 73:7, 77:8, 86:1, 87:20, 99:7, 106:16, 107:2, 109:9, 112:2, 112:24, 114:9, 114:19, 118:24</p> <p>seek [3] - 15:12, 22:15, 26:25</p> <p>seeking [3] - 43:15, 88:15, 98:5</p> <p>seem [1] - 22:24</p> <p>segregated [1] - 55:12</p> <p>seizing [1] - 73:16</p> <p>select [1] - 26:10</p> <p>selected [4] - 37:4, 86:17, 86:25, 104:12</p> <p>selecting [1] - 111:15</p> <p>selection [2] - 5:12, 87:6</p> <p>self [2] - 52:18, 61:18</p> <p>self-dealing [1] - 61:18</p> <p>self-directed [1] - 52:18</p> <p>send [1] - 44:1</p> <p>seniority [1] - 57:23</p> <p>sense [8] - 4:17, 23:15, 37:11, 52:18, 54:12, 63:21, 84:4, 84:23</p> <p>sent [1] - 89:18</p> <p>sentence [2] - 30:21, 81:22</p> <p>separate [15] - 19:24, 20:3, 20:10, 55:18, 82:25, 83:17, 89:19, 89:23, 91:5, 91:8, 98:1, 98:3, 107:12, 113:5, 113:8</p> <p>September [1] - 122:17</p> <p>serial [1] - 36:16</p> <p>series [3] - 66:17, 86:20, 87:25</p> <p>service [5] - 92:10, 93:10, 98:19, 99:4, 102:10</p> <p>Service [2] - 82:4, 82:5</p> <p>sessions [1] - 87:9</p> <p>set [18] - 8:2, 10:21, 21:14, 39:8, 39:9, 55:11, 56:3, 56:23, 59:23, 60:17, 83:10, 83:11, 83:13, 84:18, 97:1, 110:23, 116:23, 122:13</p> <p>sets [6] - 31:19, 32:6, 60:23, 85:2, 85:10, 95:19</p> <p>setting [1] - 59:18</p> <p>settled [1] - 40:11</p> <p>settlement [1] - 67:1</p> <p>Seventh [1] - 27:6</p> <p>several [7] - 13:11, 35:24, 37:21, 41:9, 55:7, 80:16, 103:12</p> <p>shall [3] - 91:21, 92:23, 93:3</p> <p>share [2] - 34:4, 34:11</p> <p>sharing [7] - 51:24, 51:25, 106:23, 116:11, 116:12, 116:13</p> <p>SHARING [1] - 1:6</p> <p>Sharing [6] - 81:19, 82:8, 82:9, 82:12, 84:17, 90:14</p> <p>shifts [1] - 6:3</p> <p>short [3] - 31:11, 58:5, 93:14</p> <p>Short [4] - 5:18, 7:15, 12:19, 15:9</p> <p>short-term [1] - 58:5</p>
---	---	--

<p>shortcoming [1] - 112:10</p> <p>shortcomings [1] - 104:23</p> <p>Shorthand [1] - 122:11</p> <p>shortly [1] - 64:19</p> <p>show [9] - 6:9, 30:3, 31:13, 44:16, 63:13, 73:23, 74:13, 103:10, 120:6</p> <p>showed [5] - 33:7, 67:18, 69:19, 75:11, 100:14</p> <p>showings [1] - 27:10</p> <p>shown [4] - 31:4, 35:14, 68:13, 69:4</p> <p>shows [5] - 42:13, 52:22, 57:5, 63:6, 108:15</p> <p>side [3] - 4:16, 73:11, 111:13</p> <p>sides [3] - 3:7, 80:13, 104:22</p> <p>sign [1] - 73:11</p> <p>signed [1] - 90:10</p> <p>significant [2] - 17:3, 52:17</p> <p>significantly [1] - 72:24</p> <p>SIMANDLE [1] - 1:19</p> <p>similar [7] - 56:7, 56:15, 98:21, 100:12, 102:6, 117:20</p> <p>similarly [3] - 1:5, 101:9, 102:15</p> <p>simple [1] - 81:13</p> <p>simply [24] - 9:3, 14:13, 21:19, 25:18, 33:23, 39:15, 41:13, 49:1, 49:19, 52:20, 55:19, 61:9, 62:4, 67:1, 71:19, 79:24, 88:12, 89:3, 99:1, 100:9, 118:11, 118:12, 119:17, 120:12</p> <p>single [21] - 13:1, 14:6, 15:4, 16:4, 19:21, 19:25, 20:14, 20:21, 38:1, 42:21, 47:11, 49:9, 70:18, 71:18, 76:9, 81:17, 83:1, 90:4, 90:6, 107:11, 113:20</p> <p>sitting [1] - 41:13</p> <p>situated [1] - 1:5</p> <p>situation [4] - 32:9, 42:10, 73:11, 118:1</p> <p>situations [2] - 11:20, 117:6</p> <p>six [1] - 62:13</p> <p>size [2] - 98:21, 100:13</p> <p>skewed [1] - 118:4</p> <p>skill [3] - 32:24, 98:20, 110:17</p> <p>skimmed [1] - 14:9</p> <p>slew [2] - 14:3, 75:2</p> <p>slightly [1] - 45:15</p> <p>slowest [1] - 16:14</p> <p>small [1] - 56:11</p> <p>smaller [1] - 118:5</p> <p>Smilow [1] - 22:13</p> <p>Smith [1] - 4:2</p> <p>snapshot [1] - 19:9</p> <p>snippets [3] - 25:6, 30:11, 30:24</p> <p>Social [1] - 112:16</p> <p>softened [1] - 29:15</p> <p>sold [1] - 117:7</p> <p>sole [1] - 48:16</p> <p>solely [1] - 25:3</p> <p>solution [2] - 73:20, 73:22</p> <p>someone [7] - 27:3, 50:22, 64:12, 72:25, 76:19, 110:24, 111:24</p>	<p>somewhat [1] - 81:1</p> <p>soon [1] - 96:2</p> <p>sophisticated [3] - 14:20, 15:20, 64:5</p> <p>sorry [4] - 22:6, 69:5, 73:21, 95:24</p> <p>sort [6] - 36:22, 46:16, 111:5, 112:17, 112:18, 115:24</p> <p>sought [3] - 19:14, 20:19, 55:6</p> <p>sounds [3] - 23:6, 25:15, 43:2</p> <p>source [5] - 65:23, 66:11, 84:22, 88:23, 116:14</p> <p>span [1] - 53:21</p> <p>Spano [3] - 27:6, 38:20, 43:18</p> <p>spans [1] - 71:15</p> <p>speaking [2] - 23:15, 80:17</p> <p>special [2] - 43:10, 64:16</p> <p>specific [4] - 12:25, 32:7, 49:3, 85:1</p> <p>specifically [10] - 38:21, 88:14, 90:13, 90:18, 90:23, 91:1, 91:17, 92:12, 92:15, 117:5</p> <p>spectrum [3] - 53:22, 77:7, 77:12</p> <p>speculation [1] - 89:3</p> <p>speculative [3] - 7:2, 21:22, 120:11</p> <p>spend [3] - 8:11, 17:25, 59:17</p> <p>spent [1] - 59:13</p> <p>spin [1] - 119:25</p> <p>split [2] - 29:19, 35:21</p> <p>spreadsheet [3] - 68:13, 68:14, 68:17</p> <p>stage [3] - 28:13, 47:3, 120:10</p> <p>stake [3] - 65:13, 76:24, 77:1</p> <p>stand [1] - 45:25</p> <p>standard [12] - 10:9, 14:13, 22:11, 22:13, 44:14, 71:24, 77:3, 86:10, 111:24, 120:20, 120:21</p> <p>standards [13] - 5:2, 23:9, 60:14, 60:23, 80:24, 81:12, 83:5, 84:25, 85:10, 85:13, 85:14, 85:25</p> <p>standing [3] - 76:11, 76:17, 77:4</p> <p>Stanford [1] - 15:11</p> <p>star [1] - 40:4</p> <p>start [9] - 37:7, 37:24, 42:23, 43:5, 51:14, 54:6, 67:23, 109:19, 111:9</p> <p>started [4] - 40:4, 51:20, 51:23, 102:11</p> <p>starting [3] - 42:19, 74:1, 76:23</p> <p>state [3] - 90:3, 99:11, 102:17</p> <p>State [1] - 122:11</p> <p>Statement [29] - 30:14, 31:1, 31:14, 31:18, 32:5, 32:12, 33:7, 53:1, 53:5, 54:13, 66:7, 68:4, 68:8, 69:20, 85:4, 85:25, 91:12, 92:7, 92:9, 93:5, 93:10, 93:17, 93:19, 93:22, 94:4, 94:10, 102:17, 106:16</p> <p>statement [8] - 10:10, 11:14, 12:4, 85:8, 93:18, 96:9, 96:12, 107:19</p> <p>statements [2] - 17:20, 68:19</p> <p>states [11] - 21:11, 88:5, 90:13, 90:18, 90:23, 91:1, 91:17, 91:21, 92:12, 92:22, 93:2</p> <p>STATES [3] - 1:1, 1:14, 1:20</p> <p>States [1] - 122:11</p>	<p>static [5] - 32:10, 33:11, 36:1, 45:2, 49:16</p> <p>stating [1] - 98:14</p> <p>statistics [1] - 74:12</p> <p>status [1] - 10:25</p> <p>statutory [1] - 109:18</p> <p>stay [1] - 73:12</p> <p>stems [1] - 7:11</p> <p>stenographic [1] - 122:12</p> <p>step [1] - 49:22</p> <p>stick [1] - 67:3</p> <p>still [5] - 29:18, 64:1, 65:18, 76:11</p> <p>stock [15] - 34:11, 34:15, 34:18, 35:1, 35:4, 35:7, 35:18, 36:18, 39:18, 53:7, 59:3, 62:11, 62:21, 63:20, 74:13</p> <p>stocks [4] - 10:19, 31:25, 52:15, 63:22</p> <p>stop [4] - 36:11, 36:17, 36:22, 51:8</p> <p>stopped [2] - 35:2, 50:14</p> <p>strata [1] - 75:12</p> <p>strategies [6] - 19:23, 19:24, 20:4, 20:11, 21:6, 86:22</p> <p>strategy [30] - 5:23, 11:4, 11:5, 11:6, 11:9, 11:11, 11:12, 11:15, 11:16, 11:21, 11:23, 12:5, 19:13, 19:21, 19:25, 20:2, 20:14, 20:21, 33:10, 36:10, 43:7, 47:15, 48:5, 49:9, 55:25, 56:8, 67:1, 95:17</p> <p>Street [2] - 2:8, 115:19</p> <p>STREETS [1] - 1:15</p> <p>strong [1] - 79:8</p> <p>strongly [1] - 67:6</p> <p>structure [8] - 20:6, 25:13, 47:17, 55:4, 56:2, 56:8, 59:19, 59:23</p> <p>structures [1] - 9:11</p> <p>studies [1] - 119:20</p> <p>stuff [1] - 110:10</p> <p>subject [4] - 55:4, 82:11, 110:12, 110:14</p> <p>submission [1] - 95:21</p> <p>submit [20] - 15:15, 18:8, 19:20, 21:6, 21:25, 25:20, 32:13, 33:4, 62:1, 79:22, 80:4, 80:24, 92:17, 96:3, 97:9, 97:10, 97:23, 105:2, 112:5, 114:24</p> <p>submitted [9] - 17:18, 30:10, 30:25, 66:16, 85:9, 88:4, 89:14, 90:1, 95:1</p> <p>submitting [1] - 97:7</p> <p>subsequent [1] - 75:15</p> <p>substantial [3] - 32:18, 70:15, 103:24</p> <p>substantive [3] - 4:24, 24:25, 25:21</p> <p>substantively [1] - 47:14</p> <p>subtracted [1] - 106:8</p> <p>subtracting [1] - 106:21</p> <p>succeed [1] - 44:19</p> <p>successful [4] - 24:5, 51:23, 52:1, 54:18</p> <p>sue [1] - 76:11</p> <p>suffer [1] - 45:5</p> <p>suffered [2] - 26:14, 47:10</p> <p>suffice [10] - 9:1, 9:5, 10:5, 19:16, 20:20, 68:7, 71:4, 94:10, 100:5</p> <p>suffices [2] - 91:12, 94:4</p>
--	--	---

<p>sufficient [2] - 21:5, 98:25 sufficiently [1] - 86:4 suggest [9] - 16:15, 71:20, 72:9, 79:23, 79:24, 88:12, 93:8, 101:1, 120:14 suggested [9] - 23:22, 49:5, 71:25, 72:5, 74:24, 92:6, 94:23, 97:19, 102:4 suggesting [4] - 56:13, 64:4, 73:24, 73:25 suggestion [4] - 20:24, 33:22, 70:17, 121:1 suggests [3] - 91:5, 99:25, 100:19 suit [2] - 41:4, 76:18 Suite [2] - 2:4, 2:13 Sullivan [8] - 6:14, 6:21, 10:25, 11:5, 17:8, 21:18, 120:8, 120:9 summary [14] - 3:6, 4:13, 8:6, 46:20, 47:8, 80:15, 88:16, 89:2, 95:9, 95:20, 96:1, 97:3, 104:19, 121:13 summer [1] - 88:1 SunAmerica [4] - 3:17, 9:16, 24:24, 40:6 superseding [1] - 48:8 supplement [1] - 65:25 supplied [1] - 112:11 supplies [1] - 117:7 supply [2] - 97:2, 97:3 support [16] - 30:10, 38:15, 39:5, 39:23, 46:13, 53:13, 57:3, 66:16, 81:21, 87:24, 88:4, 90:6, 103:12, 104:13, 110:3 supported [1] - 83:3 supports [1] - 34:21 supposed [7] - 93:25, 95:10, 107:10, 109:7, 111:10, 111:11, 111:12 Supreme [4] - 17:2, 23:22, 29:19, 97:21 surmount [1] - 5:23 surmounted [1] - 8:2 surrogate [1] - 75:6 susceptible [2] - 66:24, 67:10 suspended [1] - 66:15 sustain [1] - 69:2 sustained [1] - 68:6 swings [1] - 59:25 system [2] - 48:18 Szaferman [2] - 3:11, 3:14 SZAFERMAN [1] - 2:2</p> <p style="text-align: center;">T</p> <p>tailed [1] - 53:9 talks [2] - 9:25, 117:18 target [8] - 30:16, 32:6, 40:6, 54:12, 87:4, 87:12, 107:22, 108:1 taught [1] - 117:7 TD [1] - 112:17 teaches [4] - 5:24, 6:5, 6:21, 21:2 technology [1] - 51:22 ten [6] - 29:15, 40:14, 74:12, 101:16, 118:1, 118:12</p>	<p>tend [2] - 17:11, 116:2 tendency [1] - 34:1 tending [1] - 75:20 tension [1] - 45:24 tenure [1] - 16:15 term [10] - 30:16, 31:23, 32:6, 39:7, 39:25, 48:5, 50:5, 58:5, 93:15, 108:23 terms [14] - 5:9, 29:20, 53:15, 53:21, 54:25, 59:25, 60:20, 61:22, 77:7, 79:5, 84:18, 84:19, 87:17, 113:9 terribly [2] - 14:12, 117:14 test [6] - 12:21, 15:17, 15:25, 106:18, 114:17, 114:18 testable [2] - 118:19, 120:15 tested [1] - 120:16 testified [13] - 8:16, 9:6, 9:15, 10:16, 11:25, 59:8, 64:24, 88:3, 99:19, 101:14, 101:22, 104:1, 110:13 testify [2] - 95:13, 117:9 testifying [1] - 100:21 testimony [15] - 27:23, 31:9, 69:9, 69:11, 69:17, 87:17, 87:19, 88:21, 89:5, 94:3, 95:12, 95:18, 95:21, 100:2, 101:3 testing [2] - 114:9, 114:24 tests [1] - 64:15 text [1] - 30:25 THE [134] - 1:1, 1:6, 1:19, 3:2, 3:20, 4:3, 4:10, 4:19, 13:7, 16:10, 16:12, 17:15, 17:23, 18:3, 20:3, 20:6, 22:4, 22:7, 22:17, 22:22, 22:24, 23:3, 23:5, 23:14, 24:2, 24:4, 24:12, 24:14, 24:16, 24:18, 25:15, 27:25, 28:7, 28:20, 29:7, 34:1, 34:8, 34:21, 34:24, 35:20, 37:13, 37:18, 37:21, 38:7, 39:19, 40:22, 42:14, 42:17, 43:2, 43:24, 44:9, 44:13, 45:12, 45:24, 46:15, 46:20, 49:5, 49:13, 49:25, 51:10, 56:24, 57:12, 57:21, 58:16, 58:19, 58:22, 59:18, 59:22, 61:3, 64:4, 67:13, 70:14, 72:16, 73:5, 73:15, 74:4, 74:17, 74:20, 75:8, 75:13, 75:17, 76:17, 77:6, 78:4, 79:5, 80:6, 80:9, 80:19, 81:4, 81:7, 83:16, 83:25, 86:7, 88:14, 89:7, 94:15, 94:19, 94:21, 95:3, 95:24, 96:9, 96:18, 97:1, 97:7, 98:10, 100:4, 100:14, 102:3, 102:25, 103:2, 103:4, 104:14, 104:18, 105:3, 109:19, 112:10, 112:16, 115:5, 115:11, 115:13, 115:21, 115:24, 116:17, 116:21, 116:25, 117:15, 118:18, 119:2, 119:7, 119:23, 121:2, 121:6, 121:8, 121:16 themselves [4] - 10:17, 31:9, 45:11, 60:9 theories [5] - 23:17, 23:19, 40:10, 105:11, 115:1 theory [45] - 30:5, 35:24, 35:25, 36:15, 36:23, 38:2, 38:12, 38:16, 39:3, 39:19, 39:20, 40:1, 40:5, 40:18, 40:20, 41:25, 42:2, 42:7, 43:4, 45:3, 45:20, 47:22,</p>	<p>47:24, 48:8, 51:18, 56:14, 60:3, 61:19, 66:8, 70:3, 78:6, 79:3, 105:8, 105:16, 105:17, 105:19, 105:20, 107:3, 108:14, 112:15, 112:23, 114:18, 114:25, 115:3, 118:19 there'd [1] - 15:24 thereafter [1] - 84:14 thereby [1] - 31:24 therefore [5] - 7:3, 90:16, 91:21, 92:4, 95:1 thesis [2] - 110:12, 110:13 they've [6] - 11:14, 30:6, 37:4, 40:10, 40:12, 88:25 thin [1] - 36:9 thinking [3] - 88:7, 104:15, 118:23 third [7] - 5:3, 7:15, 13:25, 16:3, 17:11, 19:12, 68:25 Third [11] - 5:22, 6:13, 9:9, 9:11, 12:11, 12:13, 12:22, 27:8, 70:5, 77:24, 86:10 thorough [1] - 86:13 thousand [1] - 46:1 three [12] - 4:22, 16:14, 30:6, 40:3, 40:9, 65:17, 69:20, 87:7, 89:15, 97:25, 116:15 threshold [1] - 27:10 throughout [4] - 19:7, 19:11, 37:6, 72:4 tickets [2] - 48:14, 48:16 tie [1] - 96:13 TOD [1] - 2:7 today [7] - 3:4, 30:20, 56:4, 67:21, 81:9, 84:18, 94:16 Todd [1] - 3:16 tolerance [6] - 47:19, 64:24, 65:2, 65:7, 75:1, 77:7 took [8] - 15:14, 35:5, 36:24, 59:2, 59:4, 59:12, 83:25, 93:23 top [2] - 31:8, 77:2 total [3] - 42:2, 52:21, 57:6 totally [2] - 56:17, 58:25 touched [1] - 104:22 touching [1] - 27:18 towards [1] - 118:5 track [1] - 103:23 trader [1] - 65:4 training [1] - 110:18 transaction [6] - 12:7, 24:23, 47:6, 70:1, 70:2, 120:17 transcription [1] - 122:12 translator [1] - 63:9 treated [1] - 82:2 treatment [3] - 28:18, 99:7, 99:8 trial [3] - 10:24, 46:21, 61:4 true [10] - 34:6, 46:5, 46:6, 48:19, 49:22, 57:25, 58:21, 83:1, 83:3, 122:12 trued [1] - 42:5 trust [15] - 5:17, 7:9, 15:12, 15:13, 15:14, 52:13, 52:14, 81:23, 82:3, 82:16, 82:18, 82:20, 83:19, 84:5 Trust [79] - 12:17, 12:18, 80:20, 81:10,</p>
---	--	--

<p>81:11, 81:15, 81:16, 81:18, 81:19, 81:22, 82:1, 82:2, 82:5, 82:8, 82:9, 82:12, 82:15, 82:24, 82:25, 83:2, 83:6, 83:16, 83:19, 83:23, 84:1, 84:4, 84:7, 84:9, 84:12, 84:13, 84:24, 85:16, 85:24, 86:2, 86:5, 89:13, 89:16, 89:19, 89:21, 89:23, 89:24, 90:2, 90:25, 91:2, 91:5, 91:6, 91:8, 91:11, 91:12, 91:14, 91:17, 91:18, 91:22, 91:23, 91:24, 92:8, 92:9, 92:16, 92:21, 93:3, 93:9, 93:10, 93:23, 93:25, 94:4, 94:10, 94:12, 94:23, 95:6, 95:7, 95:14, 95:15, 96:22, 98:1, 98:3, 98:4, 103:7, 103:11</p> <p>trustee [2] - 54:8, 83:5</p> <p>trustees [48] - 3:25, 31:2, 32:8, 32:10, 32:17, 33:15, 34:14, 36:25, 39:10, 42:21, 48:13, 52:11, 55:11, 56:18, 58:12, 59:16, 59:24, 60:11, 60:17, 60:21, 60:22, 61:17, 61:22, 66:6, 81:11, 81:23, 82:21, 85:12, 85:14, 85:17, 85:22, 86:16, 86:22, 87:5, 87:8, 87:12, 103:25, 104:11, 104:14, 108:2, 108:4, 108:11, 108:16, 108:18, 108:25, 114:1</p> <p>TRUSTEES [1] - 2:15</p> <p>trustees' [4] - 84:18, 84:25, 85:4, 100:25</p> <p>try [1] - 14:12</p> <p>trying [2] - 56:5, 81:2</p> <p>tumble [1] - 35:5</p> <p>tumultuous [1] - 74:8</p> <p>Turkcell [1] - 14:3</p> <p>turn [9] - 5:5, 7:5, 7:20, 8:11, 12:9, 21:13, 62:3, 86:8, 111:14</p> <p>two [24] - 3:25, 6:1, 6:12, 7:5, 7:21, 18:8, 22:8, 23:17, 28:1, 28:25, 38:19, 39:1, 40:10, 58:1, 62:25, 79:5, 81:13, 86:23, 87:9, 90:1, 98:16, 103:19, 113:12, 117:17</p> <p>two-and-a-half [2] - 28:1, 28:25</p> <p>type [5] - 6:4, 15:20, 94:11, 95:15, 117:16</p> <p>types [2] - 22:8, 48:21</p> <p>typical [5] - 13:2, 65:7, 66:9, 66:19, 76:18</p> <p>typicality [6] - 5:1, 12:22, 21:19, 25:14, 62:5, 63:24</p>	<p>36:19, 37:6, 41:24, 42:1, 42:6, 45:20, 53:23, 57:6, 57:7, 57:22, 64:23, 66:6, 66:7, 67:22, 70:25, 72:14, 72:17, 77:2, 83:7, 85:2, 86:5, 93:3, 105:20, 120:8</p> <p>underlay [2] - 14:10, 68:19</p> <p>undermine [1] - 18:9</p> <p>understood [1] - 28:11</p> <p>undertaken [3] - 32:14, 33:10, 49:16</p> <p>undertook [1] - 10:21</p> <p>undisputed [1] - 48:7</p> <p>unexecuted [1] - 90:17</p> <p>unilateral [1] - 45:2</p> <p>unique [8] - 65:19, 111:5, 111:7, 116:10, 116:13, 116:17, 117:20, 119:11</p> <p>Unisys [3] - 9:11, 21:2, 79:17</p> <p>United [1] - 122:11</p> <p>UNITED [3] - 1:1, 1:14, 1:20</p> <p>universe [1] - 113:2</p> <p>unknown [1] - 58:25</p> <p>unless [7] - 4:11, 22:2, 67:11, 74:16, 78:3, 98:8, 102:23</p> <p>unlike [5] - 53:9, 53:12, 78:19, 92:2, 116:21</p> <p>unnecessary [1] - 69:18</p> <p>unnerving [1] - 37:3</p> <p>unrecognized [1] - 91:25</p> <p>unsound [2] - 112:20, 112:21</p> <p>untoward [1] - 85:23</p> <p>unusual [2] - 35:18, 48:6</p> <p>up [30] - 25:9, 33:24, 34:11, 34:18, 36:18, 39:8, 39:9, 40:2, 40:10, 42:5, 42:22, 43:11, 46:2, 49:6, 54:7, 55:12, 56:23, 58:13, 59:18, 59:23, 60:15, 60:16, 62:24, 70:8, 81:7, 85:9, 93:14, 107:11, 112:23, 113:5</p> <p>update [3] - 88:5, 88:15</p> <p>uses [2] - 12:2, 119:18</p> <p>usual [1] - 25:25</p>	<p>vice [1] - 115:20</p> <p>view [3] - 63:21, 69:11</p> <p>viewed [2] - 10:16, 46:9</p> <p>views [1] - 63:22</p> <p>Vincent [1] - 3:23</p> <p>VINCENT [1] - 2:11</p> <p>virtually [2] - 32:15, 47:20</p> <p>virtue [3] - 5:17, 21:23, 37:9</p> <p>Vision [1] - 10:13</p> <p>vs [10] - 1:8, 3:3, 5:21, 25:20, 25:24, 27:6, 38:20, 70:5, 97:21</p>
<p>U</p> <p>U.S [1] - 1:25</p> <p>U.S.C [2] - 109:18, 110:24</p> <p>ultimately [1] - 86:24</p> <p>uncertain [1] - 35:10</p> <p>uncover [1] - 26:23</p> <p>under [49] - 5:9, 6:2, 6:17, 10:25, 14:18, 14:25, 17:4, 19:4, 20:6, 22:4, 22:14, 22:17, 22:25, 23:9, 23:18, 25:11, 26:5, 26:7, 26:13, 26:21, 26:22, 32:24,</p>	<p>V</p> <p>valuable [1] - 25:19</p> <p>value [2] - 33:24, 35:7</p> <p>variables [1] - 75:6</p> <p>variance [1] - 65:20</p> <p>variety [1] - 9:21</p> <p>various [6] - 3:5, 61:23, 82:17, 82:21, 84:22, 98:23</p> <p>vary [2] - 74:2, 78:20</p> <p>vehicle [1] - 50:6</p> <p>vehicles [6] - 9:22, 10:12, 10:20, 52:16, 82:22, 84:23</p> <p>version [6] - 82:11, 90:12, 90:18, 92:11, 92:14, 93:18</p> <p>versus [2] - 42:19, 75:15</p> <p>vetted [3] - 43:9, 86:18, 87:19</p> <p>viability [2] - 9:5, 30:7</p> <p>viable [1] - 30:5</p>	<p>W</p> <p>wait [5] - 30:2, 62:12, 62:13, 96:2</p> <p>Wal [3] - 23:23, 25:20, 25:23</p> <p>Wal-Mart [3] - 23:23, 25:20, 25:23</p> <p>Wall [1] - 115:19</p> <p>wants [5] - 19:9, 36:9, 37:7, 40:24, 61:7</p> <p>ways [1] - 42:25</p> <p>WBG [1] - 32:3</p> <p>wealth [1] - 75:11</p> <p>website [16] - 87:20, 99:23, 99:24, 100:5, 100:6, 100:10, 100:14, 100:17, 100:20, 100:21, 100:22, 104:3, 104:6, 104:7</p> <p>Webster [14] - 3:18, 8:15, 9:6, 10:16, 30:18, 48:4, 79:25, 87:22, 88:25, 98:17, 99:10, 101:4, 101:14, 103:20</p> <p>Webster's [1] - 100:11</p> <p>week [1] - 96:16</p> <p>weigh [1] - 18:23</p> <p>weighing [1] - 27:14</p> <p>weight [1] - 119:6</p> <p>weighted [5] - 36:7, 39:16, 106:7, 119:19, 120:19</p> <p>weighting [1] - 106:20</p> <p>Weiss [1] - 115:20</p> <p>West [1] - 2:8</p> <p>Wharton [39] - 3:19, 24:22, 25:3, 30:18, 31:3, 33:15, 34:16, 36:25, 86:23, 87:6, 87:7, 87:18, 87:23, 88:1, 88:6, 91:11, 92:6, 92:8, 92:25, 93:5, 93:9, 93:21, 94:3, 99:1, 99:2, 99:12, 100:23, 102:5, 102:8, 102:11, 102:16, 104:6, 104:12, 107:21, 107:22, 107:25, 108:2, 108:10</p> <p>whatnot [1] - 111:13</p> <p>whatsoever [5] - 59:14, 64:22, 66:4, 86:1, 107:4</p> <p>Whitman [1] - 13:15</p> <p>whole [20] - 10:4, 14:3, 15:23, 18:12, 18:13, 19:18, 20:22, 40:2, 48:8, 70:7, 70:8, 71:17, 75:1, 82:3, 85:15, 107:8, 107:19, 108:14, 113:2, 114:3</p> <p>wholly [1] - 43:13</p> <p>wide [2] - 41:2, 109:21</p> <p>wife [6] - 62:16, 63:11, 63:13, 63:17, 63:18, 76:6</p> <p>wife's [1] - 63:13</p>

willingness ^[1] - 87:11
win ^[3] - 41:4, 44:13, 46:17
windfall ^[1] - 45:7
windfalls ^[1] - 45:21
winners ^[1] - 50:21
wisdom ^[1] - 39:25
wishes ^[1] - 13:5
withdraw ^[5] - 54:10, 54:15, 58:17,
62:20, 113:16
withdrawals ^[3] - 41:19, 44:6, 54:6
withdrawn ^[1] - 77:16
withdraws ^[1] - 66:1
withdrew ^[1] - 50:16
witness ^[3] - 9:6, 94:7
witnesses ^[1] - 10:18
woefully ^[1] - 31:11
wonder ^[2] - 30:7, 114:13
word ^[2] - 23:14, 67:15
words ^[5] - 53:4, 53:8, 59:19, 111:3,
114:6
workable ^[1] - 56:22
worker ^[2] - 56:16, 56:20
workers ^[1] - 57:17
works ^[1] - 60:24
world ^[2] - 51:22, 120:3
write ^[1] - 121:18
written ^[2] - 63:12, 83:14
wrongdoing ^[1] - 7:11
wrote ^[5] - 87:25, 88:23, 110:6, 110:12,
116:8

X

XIO1492 ^[1] - 122:16

Y

year ^[21] - 39:6, 40:13, 42:1, 42:4,
42:15, 52:7, 52:23, 54:7, 54:21, 56:16,
56:25, 57:13, 59:8, 61:1, 62:19, 73:5,
106:8, 113:14, 113:20, 118:1, 118:2
year-end ^[1] - 42:4
yearly ^[1] - 106:10
years ^[27] - 8:20, 16:14, 28:1, 28:25,
29:15, 30:6, 31:3, 40:3, 40:14, 40:17,
41:23, 47:20, 47:21, 52:2, 54:17,
54:19, 57:10, 57:17, 72:14, 74:12,
74:25, 75:15, 101:16, 115:19
young ^[4] - 56:10, 73:2, 73:14, 118:13
younger ^[13] - 19:1, 19:5, 19:6, 21:14,
40:16, 48:2, 48:9, 72:20, 72:24, 75:20,
75:21, 78:20, 118:5
yourself ^[1] - 106:5
youth ^[1] - 19:9
youthful ^[1] - 75:9